DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-72
Title: Madison County, New York, et al., Petitioners
v.
Oneida Indian Nation of New York
Docketed: July 13, 2010
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (05-6408, 06-5168, 06-5515)
Decision Date: April 27, 2010
Questions Presented

---Date---	--------Proceedings and Orders----------
Jul 9 2010	Petition for a writ of certiorari filed. (Response due August 12, 2010)
Jul 27 2010	Order extending time to file response to petition to and including September 13, 2010.
Aug 12 2010	Brief amici curiae of Town of Verona and Town of Vernon, New York filed.
Aug 12 2010	Brief amici curiae of New York, et al. filed.
Aug 12 2010	Brief amici curiae of Cayuga County and Seneca County filed.
Aug 12 2010	Brief amicus curiae of Town of Lenox, New York filed.
Aug 12 2010	Motion for leave to file amici brief filed by Citizens Equal Rights Foundation, et al.
Sep 10 2010	Brief of respondent Oneida Indian Nation of New York in opposition filed.
Sep 21 2010	Reply of petitioners Madison County, New York, et al. filed. (Distributed)
Sep 22 2010	DISTRIBUTED for Conference of October 8, 2010.
Oct 12 2010	Motion for leave to file amici brief filed by Citizens Equal Rights Foundation, et al. GRANTED. Justice Sotomayor took no part in the consideration or decision of this motion.
Oct 12 2010	Petition GRANTED. Justice Sotomayor took no part in the consideration or decision of this petition.
Nov 3 2010	The time to file the joint appendix and petitioners' brief on the merits is extended to and including December 3, 2010.
Nov 3 2010	The time within which to file respondent's brief on the merits is extended to and including January 10, 2011.
Nov 30 2010	Letter of respondent Oneida Indian Nation of New York filed. (Distributed)
Dec 1 2010	Letter of petitioners Madison County, New York, et al. filed. (Distributed)
Dec 2 2010	Reply letter of respondent Oneida Indian Nation of New York filed. (Distributed)
Dec 3 2010	Joint appendix filed (2 volumes). (Statement of costs filed)
Dec 3 2010	Brief of petitioners Madison County, New York, et al. filed.
Dec 10 2010	Brief amici curiae of Cayuga County, and Seneca County filed.
Dec 10 2010	Brief amicus curiae of Town of Lenox, NY filed.
Dec 10 2010	Brief amici curiae of New York, et al. filed.
Dec 10 2010	Brief amicus curiae of Oneida Landowners, Inc. filed.
Dec 10 2010	Brief amici curiae of Citizens Equal Rights Foundation, et al. filed.
Dec 10 2010	Brief amicus curiae of California State Association of Counties filed.
Dec 23 2010	SET FOR ARGUMENT ON Wednesday, February 23, 2011.
Jan 3 2011	CIRCULATED.
Jan 10 2011	Judgment VACATED and case REMANDED. Justice Sotomayor took no part in the consideration or decision of this case. Opinion per curiam. (Detached Opinion)
Feb 11 2011	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 10- 10-72 JUL 9 2010

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MADISON COUNTY and
ONEIDA COUNTY, NEW YORK,

Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK,

Respondent,

STOCKBRIDGE-MUNSEE COMMUNITY,
BAND OF MOHICAN INDIANS,

Putative Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 (2005) ("*Sherrill*") this Court held that standards of federal Indian law and federal equity practice precluded the Oneida Indian Nation of New York ("OIN"), the same tribe here, from unilaterally reviving its ancient sovereignty, in whole or in part, over recently-purchased property that had been owned and governed by non-Indians for 200 years. In so holding, this Court expressly rejected the tribe's claim that its sovereign immunity prevented the City of Sherrill in Oneida County, New York, from collecting unpaid property taxes through foreclosure and eviction. Despite *Sherrill*, in these two related cases involving attempts by Madison County and Oneida County to foreclose on OIN-owned fee parcels for nonpayment of lawfully imposed taxes, the lower court held that the remedy of foreclosure is barred by tribal sovereign immunity from suit—a decision which two court of appeals judges expressly (and the third, in effect) implored this Court to review.

The questions presented in this case are:

1. whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed property taxes.

2. whether the ancient Oneida reservation in New York was disestablished or diminished.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. The State of New York appeared as amicus curiae in the Second Circuit in support of the Counties. The United States appeared as amicus curiae in the Second Circuit at the request of the court.

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Petitioners Madison County and Oneida County, New York respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears in the Appendix, App. 1a to 33a and is reported at 605 F.3d 149 (2d Cir. 2010).

The opinion of the United States District Court in the Madison County case appears at App. 34a to 51a and is reported at 401 F. Supp. 2d 219 (N.D.N.Y. 2005); the Oneida County case appears at App. 52a to 78a and is reported at 432 F. Supp. 2d 285 (N.D.N.Y. 2006).

JURISDICTION

The date on which the United States Court of Appeals decided this case was April 27, 2010. No petition for rehearing was filed in this case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The jurisdiction of the court of first instance (i.e., the United States District Court for the Northern District of New York) was invoked under 28 U.S.C. §§ 1331 and 1362.

STATEMENT OF THE CASE

The decision below held that Madison County and Oneida County, two local taxing authorities, may lawfully impose real property taxes on land owned in fee simple by OIN (consistent with this Court's holding in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) ("*Sherrill*")), but that these same authorities cannot collect the taxes through foreclosure due to OIN's sovereign immunity from suit (inconsistent with *Sherrill*). The Second Circuit recognized the internal contradiction in its holding—where Madison and Oneida Counties have the right to impose real property taxes but not the right to collect them—with two judges saying the result "defies common sense" and is "so anomalous that it calls out for the Supreme Court to revisit *Kiowa* and *Potawatomi*." Petitioner's Appendix ("Pet. App.") at 32a (Circuit Judges Cabranes and Hall, concurring). The third member of the panel, writing for the court, illustrated the self-contradiction of the holding by quoting a nonsense nursery rhyme. Pet. App. at 21a.[1]

The Second Circuit reluctantly concluded that this result was compelled by this Court's prior decisions in *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991) ("*Potawatomi*") and *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751 (1998) ("*Kiowa*"), but it is not. Rather, this Court's decision in *Sherrill* directly rejected OIN's claim of

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1. Mother, may I go out to swim?
Yes, my darling daughter;
Hang your clothes on a hickory limb,
And don't go near the water.

immunity from foreclosure and eviction, and the same result is compelled here. This Court should clarify which precedent controls—and why—and provide guidance not just to the parties in this case but in all disputes between state and local taxing and regulatory authorities and Indian tribes asserting tribal immunity from suit.

This Court's Decision In *Sherrill*

In *Sherrill*, this Court rejected OIN's "unification theory" and claim of "present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations." 544 U.S. at 214. This Court held that "the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue." *Id.* at 203. OIN had "refused to pay the assessed property taxes . . . [and] [t]he City of Sherrill initiated eviction proceedings in state court." *Id.* at 211.[2] OIN sued in federal district court and sought a broad injunction premised on OIN's sovereignty over the land and its sovereign immunity from suit. *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139, 144 (2d Cir. 2003). Specifically, OIN requested an injunction that would forbid the City of Sherrill as the taxing authority from pursuing any of the following three distinct steps: (1) imposing real

2. Prior to commencing the eviction action, the City of Sherrill had obtained title to the parcels through the City's administrative foreclosure procedures, as detailed in the district court's opinion in that case. *See Oneida Indian Nation of New York v. City of Sherrill*, 145 F. Supp. 2d 226, 232-33 (N.D.N.Y. 2001).

property taxes on OIN-owned properties, (2) pursuing any remedies to collect the taxes that were due, or (3) evicting OIN after taking title to the property for nonpayment of taxes. Court of Appeals Supplemental Appendix ("SA") 10 (OIN's Complaint in *Sherrill*). OIN specifically asserted as an affirmative defense to the eviction action its tribal sovereign immunity from suit. SA-36 (OIN's Answer in *Sherrill*—Second Defense). Tribal sovereign immunity from suit also was pled by the tribe in its complaint seeking injunctive and declaratory relief (SA-8 (Complaint ¶ 21(c)) and in its reply to the City of Sherrill's counterclaims. SA-46 (Reply ¶ 42). *See Oneida Indian Nation of New York v. City of Sherrill*,145 F.Supp.2d 226, 238 (N.D.N.Y. 2001); *Sherrill*, 337 F.3d at 145-46, 169.

This Court in *Sherrill* rejected every aspect of OIN's claimed sovereign immunity from taxation and tax enforcement, and fully endorsed the City of Sherrill's authority to foreclose and evict for nonpayment of taxes. 544 U.S. at 214. The decision in *Sherrill* specifically addressed whether tribal immunity could be raised either offensively or defensively by OIN to prevent the loss of its lands through foreclosure and eviction. Justice Stevens, in dissent, decried the Court's decision, believing it "effectively proclaimed a diminishment of the Tribe's reservation and an abrogation of its elemental right to tax immunity." *Id.* at 225; *see also id.* at 226 ("To now deny the Tribe its right to tax immunity—at once the most fundamental of tribal rights and the least disruptive to other sovereigns—is not only inequitable, but also irreconcilable with the principle that only Congress may abrogate or extinguish tribal sovereignty."). Justice Stevens specifically suggested

that the tribe could raise sovereign immunity "as a *defense* against a state collection proceeding." *Id.* at 225 (emphasis in original).[3] The other eight members of this Court expressly rejected that suggestion:

> The dissent suggests that, compatibly with today's decision, the Tribe may assert tax immunity defensively in the eviction proceeding initiated by Sherrill. We disagree.

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3. Justice Stevens offered the following analysis regarding tribal immunity as a defense against a state tax collection proceeding:

> As a justification for its lawmaking decision, the Court relies heavily on the fact that the Tribe is seeking *equitable* relief in the form of an injunction. The distinction between law and equity is unpersuasive because the outcome of the case turns on a narrow legal issue that could just as easily, if not most naturally, be raised by a tribe as a *defense* against a state collection proceeding. In fact, that scenario actually occurred in this case: The City brought an eviction proceeding against the Tribe based on its refusal to pay property taxes; that proceeding was removed to federal court and consolidated with the present action; the District Court granted summary judgment for the Tribe; and the Court of Appeals affirmed on the basis of tribal tax immunity. Either this defensive use of tax immunity should still be available to the Tribe on remand, but see ante, at 214, n. 7, 161 L. Ed. 2d, at 401, or the Court's reliance on the distinctions between law and equity and between substantive rights and remedies, see ante at 213-214, 161 L. Ed. 2d, at 400-401, is indefensible.

Id. at 225-26 (emphasis in original).

> The equitable cast of the relief sought remains the same whether asserted affirmatively or defensively.

Id. at 214, n. 7 (internal citation omitted).

Developments Post-*Sherrill*

Following this Court's ruling in *Sherrill*, OIN persisted in its refusal to pay delinquent property taxes on hundreds of recently-purchased properties that, like those in *Sherrill*, had been owned and governed by non-Indians for approximately 200 years and subject to state and local taxation for generations. Madison County and Oneida County then proceeded to foreclose on those properties following their respective *in rem* procedures under New York law.[4]

OIN sought injunctive relief in federal district court. The district court enjoined both counties from foreclosing on four separate grounds, stating "unless directed otherwise by legislation or judicial mandate,

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4. Madison County's procedure requires a foreclosure action in New York State court after the redemption period has expired, while Oneida County follows a different procedure that is non-judicial and involves an administrative transfer of title to the County pursuant to a "tax sale" of all delinquent properties in the County, followed by a three-year redemption period. Pet. App. at 8a-11a. In this regard, Oneida County's procedure is similar to the City of Sherrill's procedure as described by the district court (145 F. Supp. 2d at 232-33) and upheld by this Court in *Sherrill*. The last step in the City of Sherrill's procedure was eviction, which this Court noted. *See Sherrill*, 544 U.S. at 211.

the seizure of land from a sovereign, against its will, will not occur as a result of a ruling from this forum." Pet. App. at 77a.

The Second Circuit's Reading Of *Sherrill* And Other Tribal Sovereign Immunity Cases

The Second Circuit affirmed on the ground that "the foreclosure actions are barred by the OIN's sovereign immunity from suit." Pet. App. at 23a. The Second Circuit declined to "read *Sherrill* as implicitly abrogating the OIN's immunity from suit." *Id.* at 20a. Rather, it found that "*Sherrill* dealt with 'the right to demand compliance with state laws.' It did not address 'the means available to enforce' those laws." *Id.* at 20a (quoting *Kiowa*, 523 U.S. at 755). The Second Circuit believed *Sherrill* belonged to a line of "land-based" sovereignty decisions issued by this Court which address whether tribal sovereignty exists over land—but that *Sherrill* did not decide whether a tribe, which admittedly lacks sovereignty over the land and must pay real property taxes, may nonetheless assert tribal immunity from suit as a defense to foreclosure if it refuses to pay the taxes that are due and owing. *Id.* at 16a-17a. The Second Circuit apparently accepted OIN's argument that there is a difference between sovereign immunity from taxation (sometimes referred to as "tribal tax immunity") and sovereign immunity from suit. As argued by OIN and accepted by the court below, the tribe's inability to remove the property from the tax rolls does not mean the tribe has lost its immunity from suit. According to OIN and the Second Circuit, the result here—however contradictory and illogical—was dictated by this Court's decisions in *Potawatomi* and *Kiowa*.

Judge Cabranes's Concurring Opinion

Circuit Judge Cabranes wrote a concurring opinion (joined by Judge Hall) that characterizes the panel's decision as follows: "The holding in this case comes down to this: an Indian tribe can purchase land (including land that was never part of a reservation); refuse to pay lawfully-owed taxes; and suffer no consequences because the taxing authority cannot sue to collect the taxes owed." Pet. App. at 32a. He continued, "[t]his rule of decision defies common sense." *Id.* Characterizing the result "so anomalous that it calls out for the Supreme Court to revisit *Kiowa* and *Potawatomi*" and "[reunite] law and logic," he and Judge Hall nevertheless concurred in the judgment because they concluded they were bound by those decisions as they understood them. *Id.* at 33a.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision erroneously applied this Court's precedents concerning Indian tribal sovereign immunity involving *in personam* actions against a tribe to the distinctly different setting of *in rem* foreclosure to collect real property taxes. Indeed, the lower court did so in a manner that directly conflicts with *Sherrill*, while calling for this Court to revisit the doctrine of tribal immunity from suit. The issues presented in this case are of national significance and recurring practical importance. The Second Circuit's decision that tribal sovereign immunity bars foreclosure on taxable lands purchased by Indian tribes will enable and encourage the disruptive practical consequences and serious burdens on the administration of state and local governments that troubled this Court in *Sherrill*. 544 U.S. at 219-220.

I. THE NEED TO CLARIFY FEDERAL INDIAN LAW CONCERNING TRIBAL IMMUNITY FROM FORECLOSURE.

This Court should clarify whether the holding in *Sherrill* precludes tribes from asserting sovereign immunity as a defense to foreclosure when the land is subject to real property taxation and the tribe refuses to pay lawfully owed taxes. To the extent *Sherrill* decided that question directly, as the Counties maintained below, law and logic are not in conflict and the Second Circuit's decision directly conflicts with *Sherrill*. Accordingly, this Court should grant this petition to correct the clear error of law below.

To the extent *Sherrill* can be read to have left open the question of whether tribal immunity from suit is a defense to foreclosure to collect lawfully imposed property taxes, this Court should grant this petition to clarify how, if at all, the doctrine of sovereign immunity from suit applies in this recurring context. The Second Circuit seemingly recognized that the rule adopted in this case—that the Counties may tax but not foreclose—"eviscerates *Sherrill*, making that essential right of government [to tax properties] meaningless." Pet. App. at 21a (bracketed material in original) (internal quotations marks omitted).

II. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS.

A. The Decision Conflicts With *Sherrill*.

Sherrill squarely held that OIN is barred from exercising sovereignty—in whole or in part—over the parcels purchased on the open market in fee simple, as to which the "embers of sovereignty . . . [had] long ago [grown] cold." 544 U.S. at 214. From that clear pronouncement denying OIN's claim to present-day sovereignty over the subject land, the conclusion follows that OIN's tribal patchwork of land owned in fee simple is subject to the full jurisdiction and taxing authority of local governments. Following *Sherrill*, no valid distinction can be drawn between the Counties' right to tax the land and its right to enforce those taxes through foreclosure and eviction. *Id.* at 214, n.7.

B. The Decision Conflicts With *Yakima*.

In *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) ("*Yakima*"), this Court upheld a local government's efforts to foreclose on tribally-owned properties for unpaid real property taxes. Specifically, this Court held that a state taxing authority had the power to collect ad valorem property taxes through *in rem* foreclosure proceedings where those taxes were lawfully imposed on tribally-owned lands held in fee simple. 502 U.S. at 270. The lands in question in *Yakima* were fee-patented (alienable) lands within the tribe's reservation. Yakima County assessed ad valorem property taxes on the fee-patented lands, some of which were owned by the Yakima

Nation and others by individual Indians. When the Yakima Nation refused to pay the assessed property taxes, Yakima County commenced *in rem* tax foreclosure proceedings. *Id.* at 256.

This Court recognized Yakima County's right to tax *and* foreclose on the Indian-owned lands in question, observing that the alienability of the lands "rendered them subject to assessment and forced sale for taxes." *Id.* at 263-64. This Court rejected the arguments advanced by the Yakima Nation and United States that the resulting parcel-by-parcel taxation of fee-patented lands within the Yakima reservation would create an "impracticable, *Moe*-condemned 'checkerboard' effect." *Id.* at 264.[5] In doing so, the Court in *Yakima* drew a distinction (which the Second Circuit here failed to recognize) between *in rem* and *in personam* jurisdiction:

> [B]ecause the jurisdiction is *in rem* rather than *in personam*, it is assuredly not *Moe*-condemned; and it is not impracticable either.
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> * * *

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5. In *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), this Court rejected a construction of the General Allotment Act, urged by the State of Montana, that would have extended the state's *in personam* jurisdiction to not only allottees (covered by § 6 of the Act) but also subsequent Indian owners of the allotted parcels. The *Yakima* Court recognized that such an assertion of state jurisdiction in *Moe* would have "create[d] a 'checkerboard' pattern in which an Indian's personal law would depend upon his parcel ownership . . . and would produce almost surreal administrative problems . . . ." 502 U.S. at 262 (citing *Moe*, 425 U.S. at 478-479).

> While the *in personam* jurisdiction over reservation Indians at issue in *Moe* would have been significantly disruptive of tribal self-government, *the mere power to assess and collect a tax on certain real estate is not.*

Id. at 265 (emphasis added).

This Court further explained in *Yakima* that the assessment of ad valorem property taxes "creates a burden on the property alone," such that the "[l]iability for the ad valorem taxes flows exclusively from ownership of realty on the annual date of assessment." *Id.* at 266. Thus, this Court in *Yakima* recognized the distinction between an *in rem* proceeding involving real estate held by a tribe, on the one hand, and an *in personam* proceeding against a tribe, on the other hand.[6]

Taxing authorities have the right, under *Sherrill* and *Yakima*, to impose *and* collect real property taxes assessed on Indian-owned land held in fee simple. Tribal sovereign immunity erects no bar to foreclosure.

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6. In ignoring the fundamental distinction between *in rem* and *in personam* jurisdiction, the Second Circuit also failed to note that the Oneida County administrative foreclosure procedure is similar to the City of Sherrill's administrative foreclosure procedure upheld in *Sherrill*, neither of which involves judicial action, but rather consists of an administrative "tax sale" followed by a redemption period (see n. 4, *supra*). And the Second Circuit did not recognize that a judicial *in rem* tax foreclosure procedure, such as the one employed by Madison County, is not disruptive of tribal sovereignty for the reasons stated in *Yakima*.

C. *Potawatomi* Is Inapposite.

This Court in *Potawatomi* "clarif[ied] the law of sovereign immunity with respect to the collection of sales taxes on Indian lands." *Potawatomi*, 498 U.S. at 509. The Court in *Potawatomi* did not purport to determine anything whatsoever about tribal immunity with respect to *in rem* foreclosure proceedings to collect real property taxes assessed on lands admittedly subject to taxation. *Potawatomi* does not diminish the *Yakima* rule that an *in rem* proceeding to collect property taxes does not violate tribal sovereignty because it is not "significantly disruptive of tribal self-government . . . ." *Yakima*, 502 U.S. at 265.[7] To the contrary, the Court in *Yakima* did not rely on *Potawatomi*—even though both the Yakima Nation and the United States cited *Potawatomi* in their briefs. This Court appeared to recognize that the principle articulated in *Potawatomi* simply did not control in the case of *in rem* foreclosure proceedings to collect property taxes.

The Court in *Potawatomi* observed that the tribal store in question was located on federal trust lands and acknowledged the tribe exercised sovereignty over that land. 498 U.S. at 508, 511. Given the tribe's sovereignty over the land (which is altogether missing as to the parcels at issue in *Sherrill* and here) this Court rejected the Oklahoma taxing authority's bid to sue the tribe to

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7. OIN operates the highly profitable Turning Stone Casino (www.turningstone.com), and certainly can pay property taxes without impairing its ability to govern itself. *See* Glenn Coin, *Oneida Nation Profits $115M Report Commissioned by State Shows Nation's Businesses Worth $2 Billion*, The Post-Standard (Syracuse, NY), Mar. 17, 2007, at A1 (2007 WLNR 5097843).

enforce the tribe's sales tax collection obligations for sales of cigarettes to nonmembers of the tribe, even though Oklahoma had a lawful right to tax those sales. *Id.* at 507, 512-513.

The Court specifically noted that the State of Oklahoma was not left without a remedy inasmuch as it could collect the sales tax from the wholesale distributor, and because the State could sue individual members of the tribe who violated Oklahoma law with respect to collecting sales taxes on cigarettes sold at the store. *Id.* at 514. The Second Circuit's reading of *Sherrill*, in contrast, leaves the Counties without any meaningful remedy for nonpayment of real property taxes.[8]

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8. The Second Circuit suggests, without explaining, that "[i]ndividual tribal members and tribal officers in their official capacity remain susceptible to suits for damages and injunctive relief" in connection with the OIN's nonpayment of property taxes. Pet. App. 23a. This suggestion would only lead to more litigation without any assurance that this "remedy" is viable. Susceptibility to suit may, but does not necessarily, equate to individual liability for unpaid tribal property taxes. Whether the Northern District of New York was right or not, it concluded in 2001 that it was "clear that the [OIN] representatives cannot be held personally liable for the unpaid property taxes" owed to the City of Sherrill. *Sherrill*, 145 F. Supp. 2d at 263; *aff'd on other grounds*, 337 F.3d at 169 (affirming dismissal of claims against tribal members and officers on ground that lands were not taxable), *rev'd*, 544 U.S. at 203, 212; *see also Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 542 F. Supp. 2d 908, 921 (E.D. Wis. 2008) (observing "no other means of recovery for unpaid property taxes exists" besides foreclosure).

D. *Kiowa* Is Inapposite.

Although the Second Circuit purported to follow *Kiowa*, that case is wholly inapposite. *Kiowa* did not involve state taxation or any regulatory action. Rather, *Kiowa* involved an *in personam* breach of contract action against the tribe, brought by a private party. *Kiowa*, 523 U.S. at 754. This Court concluded that the *in personam* action was barred by the doctrine of tribal sovereign immunity. *Id.* at 760. At the same time, this Court frankly noted that "there are reasons to doubt the wisdom of perpetuating the doctrine," *Id.* at 758, but felt compelled to adhere to it because Congress had not dispensed with it. *Id.* at 759-760. The Court, however, did not suggest that it was overruling or restricting *Yakima* in any way, and certainly did not suggest that a state sovereign is powerless to collect real property taxes that are due and owing.

III. THIS COURT SHOULD REVISIT THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY.

Many Indian tribes (such as OIN) are engaged in casino gambling and other business enterprises that generate great wealth, with a single tribe expected to invest $1 billion in economic development projects in Tulsa, Oklahoma.[9] Tribal gaming revenue alone

9. *See* Indianz.com, http://64.38.12.138/News/2010019038.asp ("Muscogee Nation plans $1B investment in Tulsa Projects") (last visited July 1, 2010). Tribes are reportedly engaged in operating hotels and resorts, oil companies, compressed natural gas fuel stations, wind energy projects, manufacturing plants (furniture, cigarettes), tourism, organic farming, gas stations, (Cont'd)

exceeded $26.5 billion in 2008.[10] One incident of tribal wealth and commercial activity is the purchase of real property within the boundaries of current or former reservations, as well as in areas that have never been reservation or even aboriginal lands of the particular tribe.

In light of the dramatic expansion of commercial activities by tribes and the assertion of tribal immunity from suit in settings that do not implicate tribal self-

(Cont'd)

drug stores, and smoke shops. *See e.g*, Indianz.com, http://64.38.12.138/News/2010019423.asp ("Louis Bull Tribe expands holdings with purchase of hotel") (last visited July 1, 2010); Indianz.com, http://64.38.12.138/News/2010019800.asp. ("Chickasaw Nation opens compressed natural gas fuel station") (last visited July 1, 2010); Indianz.com, http://64.38.12.138/News/2010019584.asp ("Shakopee Tribe to open organic, natural foods store in fall"); Indianz.com, http://64.38.12.138/News/2010019038.asp ("Passamaquoddy Tribe eyes purchase of furniture factory") (last visited July 1, 2010).

10. National Indian Gaming Commission (NIGC), Gaming Revenue Reports, 2008 Report, available at http:www.nigc.gov/Gaming_Revenue_Reports.aspx (last visited July 1, 2010). According to the NIGC Report to the Secretary of the Interior on Compliance with the Indian Gaming Regulatory Act (December 31, 2009), approximately 240 tribes are licensed by the NIGC to conduct gaming operations, with those tribes located in Arizona, California, Colorado, Connecticut, Florida, Iowa, Nebraska, Idaho, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Montana, North Carolina, North Dakota, New Mexico, Nevada, New York, Oklahoma, Oregon, South Dakota, Texas, Washington, Wisconsin, and Wyoming. (The NIGC's December 31, 2009 report is available at http://www.nigc.gov).

governance, this Court should revisit the judicially-created doctrine of tribal sovereignty from suit (although it need not do so to rule in the Counties' favor as *Sherrill* directly controls and permits the remedy of foreclosure). Indeed, the doctrine's rationale "can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities." *Kiowa*, 523 U.S. at 757-58. As this Court stated in *Kiowa*, the doctrine of tribal immunity from suit "developed almost by accident" and derives from a case that "simply does not stand for that proposition." *Id.* at 756. The doctrine's questionable foundation and inapposite rationale to modern tribal activities makes the doctrine ripe for abrogation or restriction.

The decision below demonstrates the practical disruptions that occur when tribes assert sovereign immunity to avoid their lawful obligations. As construed by the Second Circuit, tribal sovereign immunity would allow OIN to purchase the Empire State Building on the open market, in fee simple, and deprive the City of New York of all real property taxes in perpetuity.

A recent example of a tribe's assertion of sovereign immunity from state and local laws and regulatory action is seen in *State of New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185 (E.D.N.Y. 2007) ("Shinnecock"). The Shinnecock Nation began to clear land to construct and operate a casino in the Hamptons on Long Island on a parcel of non-reservation property as to which the tribe's aboriginal title was extinguished in the 17th century. The tribe did so without seeking or obtaining any of the required permits from New York State and local authorities. When the various state and

local entities sought to enjoin the tribe from proceeding with the casino construction, the tribe argued that tribal sovereign immunity barred enforcement of any gaming, zoning, environmental, building, fire, sanitation and other regulatory laws. 523 F. Supp.2d at 187-190. The district court in *Shinnecock* rejected the tribe's argument relying in part on *Sherrill*: "To hold otherwise would completely undermine the holding of *Sherrill* because, if defendants are immune from suit, plaintiffs here would be left utterly powerless to utilize the courts to avoid the disruptive impact that the Supreme Court clearly stated they have the equitable right to prevent." *Id.* at 298.[11]

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11. In a footnote, the district court expressly disagreed with the Northern District of New York's finding in this case that the OIN is immune from county real property tax enforcement proceedings regarding the lands at issue in *Sherrill*. 523 F. Supp. 2d. at 298, n.73. Similarly, the Eastern District of Wisconsin in *Village of Hobart*, 542 F. Supp. 2d at 921, observed:

> Unless a state or local government is able to foreclose on Indian property for nonpayment of taxes, the authority to tax such properties is meaningless, and the Court's analysis in *Yakima*, *Cass County* and *Sherrill* amounts to nothing more than an elaborate academic parlor game. Since it hardly seems likely that the Court was simply playing a game in those cases, I conclude, contrary to the district court in the *Oneida Indian Nation* cases on remand from *Sherrill*, that implicit in the Court's holding that Indian fee lands are subject to *ad valorem* property taxes is the further holding that such lands can be forcibly sold for nonpayment of such taxes.

As the district court in *Shinnecock* recognized, one answer to such extreme assertions of tribal sovereignty is to apply *Sherrill* to prevent the disruptive effects—as intended by this Court. *See* 544 U.S. at 219-220 (noting "disruptive practical consequences" would result "[i]f OIN may unilaterally reassert sovereign control and remove these parcels from the local tax rolls . . . [or] free the parcels from local zoning or other regulatory controls that protect all landowners in the area."); *see also id.* at 220, n.13. Another answer would be to abrogate or curtail the doctrine of tribal immunity from suit. By eliminating or restricting that judicially-created doctrine, this Court could restore the ability of state and local authorities to seek judicial relief when tribes take actions that violate the law, disrupt the administration of state and local government, and threaten neighboring landowners. As shown by the events in this case and *Shinnecock*, absolute tribal sovereign immunity from suit "defies common sense."

IV. THE TRIBAL SOVEREIGNTY ISSUES PRESENTED IN THIS CASE ARE OF NATIONAL SIGNIFICANCE AND RECURRING PRACTICAL IMPORTANCE.

The issue of tribal sovereign immunity from suit has arisen from Washington State to New York State and in various contexts. The Second Circuit's decision addressed the doctrine in the context of *in rem* tax foreclosure (although it ignored the difference between *in rem* and *in personam* jurisdiction). As noted above, many Indian tribes are engaged in casino gambling and other business enterprises that enable tribes to purchase large amounts of land in fee simple on the open

market. Judge Cabranes's concurring opinion cautioned that the Second Circuit's holding in this case can be applied to *any land* purchased by an Indian tribe, "including land that was never part of a reservation." Pet. App. at 32a. Accordingly, the "anomalous" result in this case, in which the Second Circuit held tribal sovereign immunity prevented taxing authorities from foreclosing to collect real property taxes, has national implications. Moreover, tribes can cite the Second Circuit decision to assert tribal immunity as a defense not just to foreclosure proceedings to collect real property taxes but also against enforcement of zoning, environmental and other regulatory laws, all beyond the borders of any existing or ancient reservation.

These disruptive consequences will result from the Second Circuit's decision if tribes, on account of tribal immunity from suit, refuse to pay lawfully-owed property taxes (as here) and take actions in violation of state and local law (as in *Shinnecock*), without being held accountable or suffering any consequences.

V. THE ANCIENT ONEIDA RESERVATION SHOULD BE DECLARED DISESTABLISHED OR DIMINISHED.

Lastly, the Second Circuit's decision should be reversed because it failed to recognize that the ancient Oneida reservation in New York was disestablished or diminished by the 1838 Treaty of Buffalo Creek (7 Stat. 550, Jan. 15, 1838), removal of Oneidas from New York, and other developments in the 19th Century. The status of the ancient Oneida reservation previously was addressed by the district court and Second Circuit in *Sherrill*. Both courts rejected the Counties' historical and legal contentions. *See* 145 F.Supp.2d at 248-254; 337 F.3d at 159-

165. This Court in *Sherrill* rejected OIN's claims of sovereign immunity from foreclosure and eviction without reaching the issue of disestablishment. 544 U.S. at 216, n. 9 ("This Court need not decide today whether, contrary to the Second Circuit's determination, the 1838 Treaty of Buffalo Creek disestablished the Oneidas' Reservation."). Even so, this Court, in reversing the Second Circuit in *Sherrill*, repeatedly referred to the Oneida reservation in the past tense, using the adjectives "ancient", "historic" and "former" (*id.* at 202-203, 213, 215, 221) while observing "the longstanding, distinctly non-Indian character of the area and its inhabitants[.]" *Id.* at 202.

The district court below relied on the Second Circuit's 2003 decision in *Sherrill* (reversed by this Court) in concluding that the Oneida reservation was "not disestablished" and exists in some form in central New York (Pet. App. at 73a-74a) —although the district court (in a subsequent decision) refused to identify the reservation's present-day boundaries. *See Oneida Indian Nation of New York v. Madison County*, 235 F.R.D. 559, 561 (N.D.N.Y. 2006). The district court below also determined that OIN's "not disestablished" reservation qualifies as an Indian reservation under New York law and therefore is not subject to taxation under state law. Pet. App. at 73a-74a.

The Second Circuit below stated that "a tribe's immunity from suit is independent of its lands," and noted that it need not reach the Counties' argument that OIN's reservation had been disestablished because its conclusion did not depend on it. Pet. App. at 16a. The Second Circuit nonetheless addressed the status of the ancient Oneida reservation in a footnote, observing that this Court in *Sherrill* "explicitly declined to resolve the question of

whether the Oneida reservation had been 'disestablished'. . . ." Pet. App. at 16a n. 6. The Second Circuit then concluded "[o]ur prior holding on this question—that 'the Oneidas' reservation was not disestablished,' *Oneida Indian Nation of N.Y.*, 337 F.3d at 167—therefore remains the controlling law of this circuit." Pet. App. at 17a n. 6. The Second Circuit thus reaffirmed its finding on disestablishment even though this Court in *Sherrill* cast serious doubt on the Second Circuit's previous analysis and reversed its decision.

The uncertain status of the ancient Oneida reservation—disestablished, diminished or possibly existing as a kind of legal fiction despite having no physical existence in New York for approximately 200 years and no defined boundaries today—continues to be an issue in this case and others. Uncertainty about the status of the Oneida and other ancient Indian reservations in central New York continues to cause conflict between Indian and non-Indian communities. A decision by this Court concerning the ancient Oneida reservation would benefit not only the parties in this case but would provide much needed guidance to other litigants and courts in New York struggling to determine the status of other former, historic reservations. *See, e.g., Cayuga Indian Nation of New York v. Cayuga County Sheriff David S. Gould*, 2010 NY Slip Op. 4023, *17, 2010 N.Y. LEXIS 981, **39 (N.Y. Ct. of App. May 11, 2010) ("To be sure, the Supreme Court has not yet determined whether parcels of aboriginal lands that were later reacquired by the [Cayuga] Nation constitute reservation property in accordance with federal law. Its answer to that question would settle the issue."). These former, historic reservations have not been physically extant for two centuries and involve lands governed and taxed for generations by state and local governments.

Accordingly, based on the historical realities, equitable considerations, and threats of disruption recognized in *Sherrill*, this Court should declare the ancient Oneida reservation to be disestablished or diminished.[12]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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12. The historical realities include the 1838 Treaty of Buffalo Creek and subsequent removal of almost all Oneidas from New York shortly thereafter. *See Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 269, n.24 (1985) ("There is . . . a serious question whether the Oneida did not abandon their claim to the aboriginal lands in New York when they accepted the Treaty of Buffalo Creek of 1838. . . .") (Stevens, J., dissenting in part) *quoted in Sherrill*, 544 U.S. at 215, n. 9.

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (APRIL 27, 2010)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2007

Docket No. 05-6408-cv (L); 06-5168-cv (CON); 06-5515-cv (CON)

(Argued: November 6, 2007
Final submission: July 20, 2009
Decided: April 27, 2010)

ONEIDA INDIAN NATION OF NEW YORK,

Plaintiff-Counter-Defendant-Appellee,

- v -

MADISON COUNTY AND ONEIDA COUNTY, NEW YORK,

Defendants-Counter-Claimants-Appellants,

STOCKBRIDGE-MUNSEE COMMUNITY, BAND OF MOHICAN INDIANS,

*Putative Intervenor-Appellant.**

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* The Clerk of Court is directed to amend the official caption of this appeal in accordance with the foregoing.

Appendix A

SACK, Circuit Judge:

This appeal is but the latest chapter in a lengthy dispute over the payment of state and local taxes by the plaintiff-appellee Oneida Indian Nation of New York (the "OIN"). The Supreme Court most recently addressed the OIN's tax obligations in *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) ("*Sherrill*"). The Court rejected the OIN's contention that parcels of lands allegedly within the boundaries of an Indian reservation once occupied by the Oneidas, which were sold to non-Indians during the early 19th century and bought back by the OIN on the open market in the 1990s, thereby came under the sovereign dominion of the OIN and were therefore exempt from municipal taxation. [1] The OIN nonetheless now seeks to enjoin the defendants-appellants Madison and Oneida Counties (the "Counties") from foreclosing

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1. The OIN's suit against Madison County, which is one of the actions consolidated in this appeal, was once consolidated with three other actions involving the City of Sherrill. *See Oneida Indian Nation of N.Y. v. Madison County*, 401 F. Supp. 2d 219, 223 (N.D.N.Y. 2005) (explaining history). In *Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*, 337 F.3d 139 (2d Cir. 2003), this Court ruled in favor of the OIN with respect to those three other actions, but vacated the Madison County action, which we found to have been dealt with in a "procedurally improper" manner by the district court. *Id.* at 170; *see also id* at 145-46, 171. The Supreme Court granted certiorari with respect to the three actions in which we had ruled in the OIN's favor, and reversed in *Sherrill*, 544 U.S. 197. The instant case is thus closely related to *Sherrill*, although it does not involve any identical actions.

on this property for non-payment of county taxes. On cross-motions for summary judgment brought in both of the cases that are consolidated on this appeal, the district court ruled in favor of the OIN. *See Oneida Indian Nation v. Oneida County*, 432 F. Supp. 2d 285, 292 (N.D.N.Y. 2006) ("*Oneida County*"); *Oneida Indian Nation of N.Y. v. Madison County*, 401 F. Supp. 2d 219, 232-33 (N.D.N.Y. 2005) ("*Madison County*"). We affirm on the ground that the OIN is immune from suit under the long-standing doctrine of tribal sovereign immunity. The remedy of foreclosure is therefore not available to the Counties.

The Stockbridge-Munsee Community, Band of Mohican Indians ("Stockbridge")[2] filed a motion to intervene in *Oneida County* pursuant to Federal Rule of Civil Procedure 24(a), with the goal of obtaining dismissal of that action to the extent that the land at issue was found to overlap with Stockbridge's purported six-square-mile reservation. The district court rejected Stockbridge's motion, finding that Stockbridge could not demonstrate an interest in the *Oneida County* litigation. *See* 432 F. Supp. 2d at 291-92. We conclude that this was not an abuse of discretion.

BACKGROUND

The history of the land at issue here and transactions affecting it has been set forth at some length in several

2. Stockbridge is referred to by various similar names in the papers before us. We employ that used by its counsel in its brief submitted to this Court.

other opinions of this and other courts. *See, e.g.*, *Sherrill*, 544 U.S. at 203-12; *Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*, 337 F.3d 139, 146-52 (2d Cir. 2003) ("Oneida Indian Nation of N.Y."), *rev'd*, *Sherrill*, 544 U.S. 197; *Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*, 145 F. Supp. 2d 226, 232-36 (N.D.N.Y. 2001), *aff'd in part, vacated and remanded in part*, *Oneida Indian Nation of N.Y.*, 337 F.3d 139, *rev'd*, *Sherrill*, 544 U.S. 197. We recite only those facts that we think are necessary for an understanding of our resolution of this appeal.

The OIN's Land

The OIN is a federally recognized Indian Tribe that is directly descended from the Oneida Indian Nation ("Oneida Nation").[3] The Oneida Nation's lands once encompassed some six million acres in what is now central New York State. In 1788, pursuant to the Treaty of Fort Schuyler between the Oneida Nation and the State of New York, the Nation ceded title to nearly all

3. Despite our use of the "OIN" acronym, the Oneida Indian Nation of New York should not be confused with the original Oneida Indian Nation, which is not a federally recognized tribe and is not a party to these consolidated cases. . . . [T]he original Oneida Indian Nation became divided into three distinct bands, the New York Oneidas, the Wisconsin Oneidas, and the Canadian Oneidas, by the middle of the nineteenth century.

Oneida Indian Nation of N.Y., 337 F.3d at 144 n.1.

of its land to the State, retaining a reservation of only approximately 300,000 acres. *Sherrill*, 544 U.S. at 203.

In 1790, Congress passed the first Indian Trade and Intercourse Act. *See* Act of July 22, 1790, ch. 33, 1 Stat. 137 ("Nonintercourse Act"). The Nonintercourse Act, which remains substantially in force today, bars the sale of tribal land without federal government acquiescence. *Sherrill*, 544 U.S. at 204. In spite of the provisions of the Act, towards the end of the 18th century and at the beginning of the 19th century, the Oneida Nation sold substantial portions of the remaining reservation land to New York State and to private parties without the federal supervision that the Act required. *See id.* at 205-06; *Oneida Indian Nation of N.Y.*, 337 F.3d at 147-48. *See also United States v. Oneida Nation of N.Y.*, 477 F.2d 939, 940 (Ct. Cl. 1973) (concluding that the federal government owed a fiduciary duty to protect members of the Oneida Nation in connection with their land dealings with New York State between 1795 and 1846). That land was subsequently sold to non-Indians in free-market transactions. *See Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*, 145 F. Supp. 2d at 234 & n.3. By 1838, the Oneida Nation had sold all but 5,000 acres of the reservation that had been created by the Treaty of Fort Schuyler. *See Sherrill*, 544 U.S. at 206. By 1920, that number had dwindled to thirty-two acres. *Id.* at 207.

Beginning in 1970, descendants of members of the Oneida Nation pursued federal litigation against local governments in New York in an effort to assert that

certain of New York State's purchases of reservation land during the late 18th and early 19th centuries had been in violation of the Nonintercourse Act, and therefore had not terminated the Oneidas' right to possess the land. *See id.* at 208-11 (summarizing cases). In the 1990s, OIN tribe members also began to purchase, through open-market transactions, land that had once been a part of the Oneida Nation's reservation. *See Oneida Indian Nation of N.Y.*, 337 F3d at 144.

The Supreme Court's Decision in Sherrill

At issue in *Sherrill* were parcels of land in the city of Sherrill (located in Oneida County, New York) that had originally been part of the Oneida Nation reservation as established by the Treaty of Fort Schuyler, but that had been transferred by the Oneida Nation to one of its members in 1805, and then in 1807 sold by that person to a non-Indian. *Sherrill*, 544 U.S. at 211. The OIN re-acquired these parcels on the open market in 1997 and 1998. *Id.* In *Sherrill*, the OIN asserted that these properties were exempt from taxation, arguing

> that because the Court in [*Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985)[4]] recognized the Oneidas' aboriginal title to their ancient reservation land and because the Tribe has now acquired the specific parcels involved in this suit in the open market, it has unified fee and aboriginal title and may now assert sovereign dominion over the parcels.

Id. at 213. Based on that contention, the OIN had brought suit in the United States District Court for the Northern District of New York seeking injunctive and declaratory relief that would require recognition of its present and future sovereign immunity from local taxation on the land. *Id.* at 214. We agreed on the basis that "land in Indian country . . . is not subject to state taxation absent express congressional authorization." *Oneida Indian Nation of N.Y.*, 337 F.3d at 154 (citing, *inter alia*, *Worcester v. State of Ga.*, 31 U.S. 515, 557 (1832), *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980), and *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985)).

The Supreme Court reversed. It "reject[ed] the unification theory of OIN and the United States and h[e]ld that 'standards of federal Indian law and federal equity practice' preclude[d] the Tribe from rekindling embers of sovereignty that long ago grew cold." *Sherrill*, 544 U.S. at 214. Noting that "justifiable expectations, grounded in two centuries of New York's exercise of regulatory jurisdiction, until recently uncontested by OIN, merit heavy weight," *id.* at 215-16, the Court concluded:

> [T]he distance from 1805 to the present day, the Oneidas' long delay in seeking equitable

4. In this 1985 case, the Court permitted the OIN to seek monetary damages for the sale of its land in the late 18th and early 19th centuries, but "reserved for another day the question whether 'equitable considerations' should limit the relief available to the present-day Oneidas." *Sherrill*, 544 U.S. at 213 (citing *Oneida County, N.Y.*, 470 U.S. at 253, n.27).

> relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate.

Id. at 221.

Madison County's Actions

Madison County has regularly assessed taxes with respect to the parcels of land in the county that were purchased by the OIN in the 1990s that are claimed to lie within the boundaries of the reservation described in the Treaty of Fort Schuyler. *See Madison County*, 401 F. Supp. 2d at 223. Each year in which the OIN failed to pay property taxes, Madison County would initiate foreclosure proceedings against the OIN-owned parcels as part of its yearly foreclosure actions in state court. Madison County would then abandon the foreclosure proceedings against the OIN-owned parcels, in anticipation of a resolution of the taxability question in *Sherrill*, when it became clear that the *Sherrill* litigation would continue for another year. *Id.* Madison County initiated and then abandoned foreclosure proceedings in this manner in each year until 2003, *id.*, when this Court effectively separated the on-going *Madison County* litigation from the *Sherrill* litigation and remanded it to the district court for further proceedings, *see Oneida Indian Nation of N.Y.*, 337 F.3d at 171.

On November 14, 2003, the county instituted a foreclosure action with respect to such OIN-owned property in New York State court. *Madison County*, 401 F. Supp. 2d at 223. This time, however, the county did not abandon these foreclosure proceedings as it has done in previous years. A Petition and Notice of Foreclosure was mailed to the owners of property that the county was seeking foreclosure upon for non-payment of taxes, including the OIN, on December 8, 2004, and was published in December 2004 and January 2005. *Id.* It specified March 31, 2005, as the last day for redemption of these properties.[5] *Id.* The Supreme Court decided *Sherrill* on March 29, 2005, just two days before this final day of redemption. *Id.* On April 28, 2005, Madison County moved for summary judgment in the 2003 state court foreclosure action. *Id.* In the instant federal proceedings, however, which had been pending in the district court following this Court's remand in 2003, the district court issued a preliminary injunction enjoining the state foreclosure proceedings. *See id.*; *Oneida Indian Nation of N.Y. v. Madison County*, 376 F. Supp. 2d 280, 283 (N.D.N.Y. 2005).

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5. New York Real Property Tax Law § 1110 requires at least two years of notice prior to the expiration of a redemption period. The OIN contends, and the district court agreed, that it was a violation of constitutional due process guarantees for the county to fail to comply with this two-year notice provision by issuing notice on December 8, 2004, that the redemption period would expire on March 31, 2005, less than two years later. Because we decide this case on other grounds, we need not and do not reach this ruling. We also do not reach a similar due process argument that is made with respect to Oneida County's foreclosure procedures.

Appendix A

Oneida County's Actions

Oneida County follows a property tax foreclosure procedure that is different from Madison County's. Pursuant to county law, the county arranges for and advertises a tax auction for the sale of any property on which taxes, which are uniformly due on January 31, are delinquent by six months or more. *See Oneida County*, 432 F. Supp. 2d at 287. The tax sale is held on the last business day of December. *Id.* The delinquent taxpayer then has three years to redeem the property, and an additional thirty days following receipt of a Final Notice Before Redemption. *Id.* at 287-88. This process was adhered to with respect to all 280 OIN-owned parcels located within both Oneida County and, allegedly, the reservation boundaries established by the Treaty of Fort Schuyler. During the summer and early autumn of 2005, Final Notices Before Redemption were delivered to the OIN regarding 187 of those parcels. *Id.* at 288. On October 28, 2005, the OIN sought and received a restraining order preventing further foreclosure efforts against any of the 280 parcels, pending this outcome of this litigation. *See id.*

Stockbridge

Stockbridge seeks to intervene in these proceedings based on its contention that fifty-two land parcels (two in Oneida County and fifty in Madison County) are part of an undiminished reservation of the Stockbridge Band rather than the Oneidas. There is litigation pending addressing this claim in the Northern District of New

York. *See Stockbridge-Munsee v. State of New York*, No. 3:86-CV-1140 (N.D.N.Y. Oct. 15, 1986). Stockbridge argues that the Treaty of Fort Schuyler set aside a six-square-mile permanent reservation for the Stockbridge Band, separate from a surrounding 250,000 acre tract reserved for the Oneidas.

District Court Proceedings

In both of the cases consolidated on appeal, the district court concluded that the remedy of foreclosure was not available to the Counties on four independent grounds: 1) the Nonintercourse Act renders the OIN's properties inalienable and therefore not subject to foreclosure, *see Madison County*, 401 F. Supp. 2d at 227; *Oneida County*, 432 F. Supp. 2d at 289; 2) tribal sovereign immunity bars suit against the OIN, *see Madison County*, 401 F. Supp. 2d at 228-29; *Oneida County*, 432 F. Supp. 2d at 289; 3) the Due Process Clause of the Fifth Amendment was violated by the Counties' failure to give the OIN adequate notice of the expiration of the redemption period, *see Madison County*, 401 F. Supp. 2d at 230; *Oneida County*, 432 F. Supp. 2d at 289-90; and 4) the land in question is exempt from taxation under New York State law, *see Madison County*, 401 F. Supp. 2d at 231; *Oneida County*, 432 F. Supp. 2d at 290.

The district court denied Stockbridge's motion to intervene in *Oneida County* on the ground that Stockbridge could not demonstrate sufficient interest in the litigation. *See* 432 F. Supp. 2d at 291-92.

Appendix A

The Counties appeal from the grant of summary judgment against them. Stockbridge appeals from the district court's denial of its motion to intervene. The State of New York appears as amicus curiae in support of the Counties, urging us to reverse the decision of the district court. Upon order of this Court, the United States also submitted a brief as amicus curiae. In that brief, the United States urges us to affirm on the ground that the OIN's tribal sovereign immunity bars the Counties' efforts to foreclose on OIN-owned land.

Since this Court heard oral argument in this matter, there have been several developments that affect the practical implications of this Court's decision on Madison and Oneida Counties. While these developments do not render moot any of the issues before this Court on appeal, we think it useful to describe them briefly.

In a Record of Decision issued on May 20, 2008, in response to the OIN's application, the Department of the Interior determined that it would take 13,003.89 acres of the OIN-owned land at issue in this appeal into trust, pursuant to 25 U.S.C. § 465 and 25 C.F.R. Part 151. *See* Department of the Interior, Record of Decision, May 20, 2008 ("Record of Decision"). Notice of this decision was published in the Federal Register on May 23, 2008. 73 Fed. Reg. 30144. This land will no longer be subject to state or local taxation. 25 U.S.C. § 465. As a result, only approximately 4,000 of the 17,000 acres of property originally at issue in this case will remain subject to state and local taxation in the future.

In connection with the land trust, in order to satisfy the trust regulations, the OIN has posted letters of credit securing the payment of all taxes, penalties, and interest determined by the courts to be due on the land at issue and has agreed to supplement or replace those letters to secure payment of any additional penalties and interest that may accrue while litigation concerning the trust decision is pending. Record of Decision at 53. These letters cover substantially all taxes, penalties, and interest assessed on all of the OIN-owned property at issue in this case, including those parcels that the Department of the Interior has decided not to take into trust. Accordingly, notwithstanding this Court's decision on this appeal, it appears that the Counties will receive back payment of all taxes, penalties, and interest due on the property at issue in this lawsuit. Despite this development and the practical implications it has for the parties in this case, we reiterate that it does not render moot any of the issues raised on nor affect our consideration of this appeal.

DISCUSSION

I. Standard of Review

We review a district court's grant of summary judgment *de novo*, construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor." *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 113 (2d Cir. 2005). "[S]ummary judgment is appropriate where there exists no genuine issue of material fact and, based on the undisputed facts,

the moving party is entitled to judgment as a matter of law." *D'Amico v. City of N.Y.*, 132 F.3d 145, 149 (2d Cir. 1998); *see also* Fed. R. Civ. Pro. 56(c).

II. Tribal Sovereign Immunity

A. The Distinction Between Sovereign Authority Over Reservation Lands And Sovereign Immunity From Suit

The Counties assert that the Supreme Court's decision in *Sherrill* requires reversal here because the *Sherrill* Court ruled that the land in question is not sovereign tribal land, and it is therefore subject to taxation. The Counties interpret *Sherrill* to hold that the OIN cannot assert sovereign immunity to prevent a foreclosure action on such land.

We think that this argument improperly conflates two distinct doctrines: tribal sovereign authority over reservation lands and tribal sovereign immunity from suit. The freedom from state taxation, in the broader context of immunity from state regulation, which is addressed in *Sherrill*, arises from a tribe's sovereign authority over its reservation lands. This sovereign authority was examined by the Supreme Court as early as 1832:

> From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and

> manifest a firm purpose to afford that protection which treaties stipulate. All these acts . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive . . . .

Worcester v. State of Ga., 31 U.S. 515, 556-57 (1832) (Marshall, C.J.), abrogated on other grounds as recognized by *Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001) (remarking that "the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation."). "The conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester* . . . has given way to more individualized treatment of particular treaties and specific federal statutes." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

But the Supreme Court has "categorical[ly]" maintained that "[a]bsent cession of jurisdiction or other federal statutes permitting it, . . . a State is without power to tax reservation lands and reservation Indians." *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1992) (internal quotation marks omitted). This principle has been traced in later Supreme Court decisions to *Worcester* and other cases of its era. *See, e.g.*, *id.* at 257-58; *Mescalero*, 411 U.S. at 148; *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985).

When the Supreme Court held in *Sherrill* that the OIN could not "rekindl[e] embers of sovereignty that long ago grew cold," 544 U.S. at 214, the sovereignty to which it was referring was of the sort described in *Worcester* and its progeny. Indeed, the decision of this Court that *Sherrill* reversed had focused on this land-based "Indian sovereignty doctrine," *Oneida Indian Nation of N.Y.*, 337 F.3d at 155 (internal quotation marks omitted), that had emerged from *Worcester* and other 19th century cases, *see id.* at 153-55. The Supreme Court applied this doctrine to the facts at hand in *Sherrill* when rejecting the OIN's prayer for relief.

That doctrine is different, however, from the doctrine of tribal immunity from suit. While the tax exemption of reservation land arises from a tribe's exercise of sovereignty over such land, and is therefore closely tied to the question of whether the specific parcel at issue is "Indian reservation land," *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110 (1998), a tribe's immunity from suit is independent of its lands.[6] *See Kiowa Tribe of Okla. v.*

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6. Thus, we need not reach the Counties' argument that the OIN's reservation has been disestablished. Our conclusion does not depend upon it. We note, however, that the Supreme Court in Sherrill explicitly declined to resolve the question of whether the Oneida reservation had been "disestablished," thus rendering the land in question no longer part of a reservation or otherwise part of "Indian country" as defined by 18 U.S.C. § 1151. *Compare Sherrill*, 544 U.S. at 214 n.8 ("We resolve this case on considerations not discretely identified in the parties'

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Mfg. Tech., Inc., 523 U.S. 751, 754 (1998) ("[O]ur cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred.").

The doctrine of tribal immunity from suit has a distinctive history in the Supreme Court. As the Court explained in *Kiowa*:

> Though the doctrine of tribal immunity [from suit] is settled law and controls this case, we note that it developed almost by accident. The doctrine is said by some of our own opinions to rest on the Court's opinion in *Turner v. United States*, 248 U.S. 354 (1919). Though *Turner* is indeed cited as authority for the immunity, examination shows it simply does not stand for that proposition.

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briefs . . . .") with *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 2004 U.S. S. Ct. Briefs LEXIS 492 at **1, 2004 WL 1835364 at *i, (U.S. Aug. 12, 2004) (Appellate Br. for Pet.) (stating that one of the questions presented for review was "[w]hether alleged reservation land is Indian country pursuant to 18 U.S.C. § 1151 . . . ."). Our prior holding on this question — that "the Oneidas' reservation was not disestablished," *Oneida Indian Nation of N.Y.*, 337 F.3d at 167 — therefore remains the controlling law of this circuit. *See, e.g., Roman v. Abrams*, 822 F.2d 214, 226 (2d Cir. 1987) (deciding that remand by the Supreme Court did not disturb the precedent set by the portions of the remanded case that the Supreme Court did not reach).

Appendix A

. . . .

Turner's passing reference to immunity, however, did become an explicit holding that tribes had immunity from suit. We so held in [*United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506 (1940)], saying: "These Indian Nations are exempt from suit without Congressional authorization." [*Id.*] at 512 (citing *Turner*, *supra*, at 358). As sovereigns or quasi sovereigns, the Indian Nations enjoyed immunity "from judicial attack" absent consent to be sued. Later cases, albeit with little analysis, reiterated the doctrine.

The doctrine of tribal immunity came under attack a few years ago in *[Okla. Tax Comm'n v. Citizen Band] Potawatomi [Indian Tribe of Okla.*, 498 U.S. 505 (1991)] . . . . We retained the doctrine, however, on the theory that Congress had failed to abrogate it . . . .

[There are] considerations [that] might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment.

> Congress has acted against the background of our decisions. It has restricted tribal immunity from suit in limited circumstances. And in other statutes it has declared an intention not to alter it.
>
> . . .
>
> Congress "has occasionally authorized limited classes of suits against Indian tribes" and "has always been at liberty to dispense with such tribal immunity or to limit it." *Potawatomi*, *supra*, at 510. It has not yet done so.

523 U.S. at 756-59 (citations omitted).

The *Kiowa* Court highlighted the separate and independent natures of the doctrines of tribal immunity from taxation and other powers of the state, and tribal immunity from suit that controls the case at bar:

> We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In *Potawatomi*, for example, we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes. There is a

> difference between the right to demand compliance with state laws and the means available to enforce them.

Id. at 755. (citations omitted).

While the doctrine of tribal sovereign authority over land has "undergone considerable evolution [in the Supreme Court] in response to changed circumstances," *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 171 (1973), the doctrine of tribal immunity from suit has not. The *Kiowa* Court indicated in the portion of the opinion set forth above that it looks to Congress for any such change.

In light of this history, we do not read *Sherrill* as implicitly abrogating the OIN's immunity from suit. No such statement of abrogation was made by the *Sherrill* Court, nor does the opinion call into question the *Kiowa* Court's approach, that any such abrogation should be left to Congress. *Sherrill* dealt with "the right to demand compliance with state laws." *Kiowa*, 523 U.S. at 755. It did not address "the means available to enforce" those laws. *Id.*

B. Application to the Case at Bar

We are left then with the rule stated in *Kiowa*: "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.* at 754. We therefore agree with the district court that the remedy of foreclosure is

not available to the Counties unless and until Congress authorizes such suits or the OIN consents to such suits. Because neither of these events has occurred, the foreclosure actions are barred by the OIN's immunity from suit.

The Counties argue that the notion that they may tax but not foreclose is inconsistent and contradictory. To be sure, the result is reminiscent of words of the nursery rhyme:

> Mother, may I go out to swim?
>
> Yes, my darling daughter; Hang your clothes on a hickory limb, And don't go near the water.[7]

Or, as the Counties more soberly assert, such a rule "eviscerates" *Sherrill*, "making that essential right of government [to tax properties] meaningless." Appellants' Br. at 51.

But a similar argument was rejected by the Supreme Court in *Potawatomi*.[8] There, the Court held that

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7. *Quoted in, e.g.*, Rose Cecil O'Neill, "The Hickory Limb" (1907), available at *www.gutenberg.org/files/28886/28886-8.txt* (last visited Mar. 19, 2010).

8. The Counties argue that a right without a remedy is meaningless. Despite Chief Justice Marshall's eloquent statement that the government of the United States cannot be

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Oklahoma had the authority to tax certain cigarette sales made at the tribe's convenience store. *Potawatomi*, 498 U.S. at 512. The Court also ruled that the tribe's immunity from suit prevented the state from bringing suit to collect unpaid taxes. The Court reconciled these two rulings thus:

> Oklahoma complains that, in effect, decisions such as *Moe [v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976),] and *[Washington v. Confederated Tribes of] Colville [Reservation*, 447 U.S. 134 (1980), (authorizing taxation in certain circumstances)] give them a right without any remedy. There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not

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called a government of laws "if the laws furnish no remedy for the violation of a vested legal right," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803), our courts often conclude that there is no remedy to vindicate the violation of a right. Consider the doctrine of qualified immunity. In cases raising the issue of qualified immunity, a state actor may have violated the plaintiff's constitutional rights, but the court nevertheless decides that the actor is entitled to qualified immunity. *See, e.g., Moore v. Andreno*, 505 F.3d 203 (2d Cir. 2007) (holding that plaintiff's Fourth Amendment rights were violated but that defendants were entitled to qualified immunity because that right was not clearly established). In these cases, there was a "violation of a vested legal right," but the "laws furnish no remedy." *Marbury*, 5 U.S. at 163.

> persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State . . . . States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax. And if Oklahoma and other States similarly situated find that none of these alternatives produce the revenues to which they are entitled, they may of course seek appropriate legislation from Congress.

498 U.S. at 514 (citations omitted).

Individual tribal members and tribal officers in their official capacity remain susceptible to suits for damages and injunctive relief. *See Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 171 (1977) ("[W]hether or not the Tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members is permissible."). They may therefore be enjoined from violations of state law. But if such enforcement mechanisms fail and if no agreement can be reached between the Counties and the OIN, the Counties' ultimate recourse will be to Congress, as we understand the Supreme Court to have instructed.

Because we affirm on the ground that the foreclosure actions are barred by the OIN's sovereign immunity from suit, we need not and do not reach the other three rationales relied upon by the district court.

Appendix A

III. Abstention

The Counties argue that the district court "erred as a matter of law in refusing to abstain from interfering with the Counties' tax foreclosure process." Appellants' Br. at 105. "We evaluate a district court's determination not to abstain . . . *de novo*, because it implicates the court's subject matter jurisdiction." *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 90 (2d Cir. 2004). We agree with the district court, *see Madison County*, 401 F. Supp. 2d at 225, that abstention is not appropriate here.

The Counties' abstention argument appears to be based on 28 U.S.C. § 1341, which states that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." As the Counties note, though, in *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976), the Supreme Court created an "exception to the general rule barring federal interference with state tax administration." Appellants' Br. at 106. The *Moe* Court concluded that Indian tribes should be permitted to bring federal lawsuits that the United States could have brought on a tribe's behalf as trustee — a principle that the Court found expressed in the legislative history of 28 U.S.C. § 1362, which provides that "[t]he district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the

Constitution, laws, or treaties of the United States." The Court decided that inasmuch as "the United States [was] not barred by § 1341 from seeking to enjoin the enforcement of a state tax law, . . . the Tribe [was] not barred from doing so . . . ." *Moe*, 425 U.S. at 474-75 (citation omitted).

The Counties argue that this exception is inapplicable here because "*Sherrill* held that local government — and not OIN — has full sovereignty over the land at issue." Appellants' Br. at 106. But *Moe* does not depend on whether a tribe has sovereignty over any particular land. We perceive no reason why, because of *Sherrill* or otherwise, the holding of *Moe* should not apply to the case at bar. Accordingly, we decline to order the district court to abstain from exercising jurisdiction over this matter.

IV. Stockbridge's Motion to Intervene

Stockbridge appeals from the district court's denial of its motion to intervene in the *Oneida County* litigation as a matter of right pursuant to Federal Rule of Civil Procedure 24(a)(2).[9] We review the district court's denial

9. Stockbridge does not appeal the district court's denial of its motion to intervene in the *Madison County* case. Stockbridge does, however, argue as amicus curiae, *see* Stockbridge Br. at 11 n.4 and 40 n.10, that it was an abuse of discretion for the district court to deny Madison County's motion to file a Rule 19 motion to dismiss for failure to join an indispensable party in that case. For the reasons set forth in

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of a Rule 24(a) motion for abuse of discretion. *Brennan v. N.Y. City Bd. of Educ.*, 260 F.3d 123, 128 (2d Cir. 2001).

Rule 24(a)(2) states: "On timely motion, the [district] court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."

> Intervention as of right under Rule 24(a)(2) is granted when all four of the following conditions are met: (1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the other parties.

MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc., 471 F.3d 377, 389 (2d Cir. 2006).

(Cont'd)

the Rule 24 analysis, we conclude that Stockbridge is not an indispensable party to these actions, and that the district court therefore did not abuse its discretion in denying Madison County's Rule 19 motion to dismiss.

Stockbridge sought to intervene for the sole purpose of seeking dismissal of this case insofar as it relates to the parcels of land that are allegedly part of the Stockbridge reservation. The ground for dismissal that Stockbridge proposed to assert was that "Stockbridge is a necessary and indispensable party which enjoys sovereign immunity from suit and cannot be forced to join this action. In its absence, the suit cannot proceed and must be dismissed as to all Oneida County lands situated within the 1788 Stockbridge treaty reservation." Stockbridge Mot. to Intervene at 2, *Oneida County*, dated November 25, 2005. In other words, Stockbridge asserts that it is a required party under Federal Rule of Civil Procedure 19(a)(1), but that joinder is not feasible as a result of Stockbridge's immunity from suit, and dismissal is therefore warranted under Rule 19(b) because Stockbridge is an indispensable party under that rule.

Rule 19(a), governing "Required Joinder of Parties," and Rule 24(a)(2), covering "Intervention of Right,"[10] under which Stockbridge asserts its claim here, "are intended to mirror each other." *MasterCard*, 471 F.3d at 390. Rule 19(a) requires parties to be joined if joinder is feasible and if the parties are necessary to "accord complete relief among existing parties," Fed. R. Civ. P. 19(a)(1)(A), or if, under specified circumstances, disposing of the case without that party might "(i) as a

10. This subsection covers such intervention other than that provided for by federal statute, which is covered by subsection (a)(1) and is not at issue here.

practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest," Fed. R. Civ. P. 19(a)(1)(B).[11] "[I]f a party is not 'necessary' under Rule 19(a), then it cannot satisfy the test for intervention as of right under Rule 24(a)(2)." *MasterCard*, 471 F.3d at 389.

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11. Federal Rule of Civil Procedure 19(a)(1) reads in its entirety:

> (a) Persons Required to Be Joined if Feasible.
>
> > (1) ***Required Party.*** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
> >
> > > (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> > >
> > > (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> > >
> > > > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> > > >
> > > > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Id. (emphasis in original).

Stockbridge argues that it is a necessary party under both Rule 19(a)(1)(B)(i) and (ii) because disposing of this matter in its absence might "as a practical matter impair or impede Stockbridge's ability to protect its interest" relating to the subject of the action, Stockbridge Br. at 8, and might also "leave the County subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations," *id.* at 48.[12] But under either theory, Stockbridge must first show that it "claims an interest relating to the subject of the action." Fed. R. of Civ. P. 19(a)(1)(B). As explained in *MasterCard*, 471 F.3d at 390, and discussed above, Rule 24 requires a similar showing if Stockbridge is to establish the ability to intervene as a matter of right.

The district court determined that Stockbridge lacked an interest in the instant litigation and therefore denied its motion to intervene. *Oneida County*, 432 F. Supp. 2d at 292. We agree.

> [F]or an interest to be cognizable under Rule 24(a)(2), it must be direct, substantial, and legally protectable. An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule.

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12. Although Stockbridge includes this statutory language in its argument, it has failed to identify any possibility that a failure to join them would subject the existing parties to inconsistent obligations.

Brennan, 260 F.3d at 129 (citations and internal quotation marks omitted). Stockbridge's purported interest in this case stems from the fact that it is currently involved in litigation in which it is asserting that a portion of the land at issue here is in fact part of the Stockbridge reservation. *See Stockbridge-Munsee v. State of New York*, No. 3:86-CV-1140 (N.D.N.Y. Oct. 15, 1986).[13] Stockbridge is therefore concerned that the present litigation could hinder its efforts to protect its property interest in that land.

The parties to this litigation do not, however, purport to put at issue the boundaries of the OIN's or Stockbridge's reservation. Nor, with the exception of the OIN's claims under state law, do the Tribe's arguments so much as touch on the issue of the continued existence of the reservation irrespective of its boundaries. We think that *Sherrill*'s rejection of the "unification theory," 544 U.S. at 214, under which the OIN argued that it had "unified fee and aboriginal title and may [therefore] assert sovereign dominion over the parcels," *id.* at 213, has taken the question of the reservation boundaries off the table for purposes of this appeal. What is relevant now is the OIN's assertion that it is immune from suit even if it does *not* have sovereign control over the land in question. The Counties' contrary assertion is that they can foreclose on land owned by the OIN *irrespective of* whether it is now or ever was part of the tribe's reservation. Stockbridge's interest

13. The OIN and both of the Counties are parties to that litigation.

in this litigation is therefore remote at best, because these assertions are unrelated to the question of reservation boundaries.[14]

Finally, we note that the manner in which we decide this appeal also renders minimal the likelihood that Stockbridge will be prejudiced by its failure to be allowed to intervene.[15]

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

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14. The *Madison County* district court did refer to "[t]he properties at issue" in the litigation being "located within the [Oneida] Nation's reservation." 401 F. Supp. 2d at 231. We hardly think that this sort of comment made by a district court — or an appellate court for that matter — in this case, where neither the issue nor a party claiming otherwise is before the court, is cause for a legitimate concern on the part of Stockbridge that its rights may be adversely affected in this litigation.

15. In light of our conclusion, we need not reach the argument raised by the United States, as amicus curiae, that the appeal of the denial of the motion to intervene was not timely filed.

Appendix A

Jose A. CABRANES, *Circuit Judge*, with whom JUDGE *Peter W. Hall* joins, concurring:

The holding in this case comes down to this: an Indian tribe can purchase land (including land that was never part of a reservation); refuse to pay lawfully-owed taxes; and suffer no consequences because the taxing authority cannot sue to collect the taxes owed.[1]

This rule of decision defies common sense. But absent action by our highest Court, or by Congress, it is the law. In the last twenty years, the Supreme Court has twice held that, although states may have a right to demand compliance with state laws by Indian tribes, they lack the legal means to enforce that right. *See Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 755 (1998) ("There is a difference between the right to demand compliance with state laws and the means available to enforce them."); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991) (holding that states have a right to collect taxes on certain cigarette sales on an Indian reservation, but the tribe is immune from suit seeking

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1. The Department of the Interior has agreed to accept roughly 13,000 of the tribe's 17,000 acres into trust. Department of the Interior, Record of Decision, May 20, 2008. Once the land is held in trust, it will no longer be subject to state and local taxation. 25 U.S.C. § 465. To be taken into trust, however, the tribe must pay all back taxes, penalties, and interest owed on the land before it will be taken into trust. 25 C.F.R. § 151.13. Accordingly, the practical effect on the Counties of our holding is limited to the 4,000 acres that will remain out of the trust.

to enforce that right). In light of this unambiguous guidance from the Supreme Court, I am bound to concur with the conclusion that, although the Counties may tax the property at issue here, *see City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), they may not foreclose on those properties because the tribe is immune from suit.

This result, however, is so anomalous that it calls out for the Supreme Court to reconsider *Kiowa* and *Potawatomi*. I wish that we were empowered to revisit those decisions, but, alas, that is not a privilege extended to intermediate appellate courts. If law and logic are to be reunited in this area of the law, it will have to be done by our highest Court, or by Congress.

Accordingly, I concur in the judgment of the Court and in the careful and comprehensive opinion of Judge Sack.

APPENDIX B — MEMORANDUM DECISION AND ORDER AND PERMANENT INJUNCTION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICTOF NEW YORK (JUNE 2, 2006)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

6:05-CV-945

ONEIDA INDIAN NATION,

Plaintiff,

-v-

ONEIDA COUNTY,

Defendant.

June 2, 2006, Decided

JUDGES: David N. Hurd, United States District Judge.

OPINION BY: David N. Hurd

OPINION

Appendix B

MEMORANDUM-DECISION and ORDER and PERMANENT INJUNCTION

I. *INTRODUCTION*

Plaintiff Oneida Indian Nation ("the Nation") commenced this action on July 27, 2005, seeking declaratory and injunctive relief preventing defendant Oneida County from foreclosing, for non-payment of taxes, property owned by the Nation. On October 28, 2005, a Temporary Restraining Order was issued restraining and enjoining Oneida County from undertaking any further efforts to effectuate, maintain or complete administrative or other foreclosures or to withdraw the right of redemption as to lands possessed by the Nation in Oneida County. On November 2, 2005, a Joint Stipulation was filed by the Nation and Oneida County extending the Temporary Restraining Order and setting forth a timetable for filing and briefing motions.

On November 29, 2005, the Stockbridge-Munsee Band of Mohican Indians ("Stockbridge") filed a motion to intervene. Oneida County did not object. Amicus State of New York ("the State") concurred with the position of Oneida County. The Nation opposes.

In accordance with the stipulation of the parties, the Nation filed a motion for summary judgment. Oneida County opposed and cross-moved for summary judgment. The State filed an amicus brief opposing the Nation's motion and supporting Oneida County's cross-motion.

Appendix B

Oral argument was heard on January 30, 2006, in Utica, New York. Decision was reserved.

II. *BACKGROUND*

The historical background set forth in the prior decisions regarding Madison County and the City of Sherrill likewise applies here. *See Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*, 145 F. Supp. 2d 226, 233-36 (N.D.N.Y. 2001), *aff'd*, 337 F.3d 139, 146-52 (2d Cir. 2003), *vacated & remanded*, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005); *Oneida Indian Nation of N.Y. v. Madison County*, 401 F. Supp. 2d 219, 222-223 (N.D.N.Y. 2005); *see also Oneida Indian Nation of N.Y. v. Madison County*, 145 F. Supp. 2d 268 (N.D.N.Y. 2001), *vacated & remanded*, 337 F.3d 139 (2d Cir. 2003). The following undisputed facts are specific to this action.

At issue in this litigation are 280 properties owned by the Nation that are located within Oneida County. Part of the Oneida Indian Reservation, as reserved to the Nation in the 1788 Treaty of Ft. Schuyler and confirmed in the 1794 Treaty of Canandaigua, ("the Reservation") lies within the boundaries of Oneida County. All of the 280 properties at issue here fall within the Reservation. (Thomas Decl. P8.)[1]

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1. Oneida County denies that this fact is material. It also denies that some or all of the properties are within the Reservation, relying upon the failure of the United States Supreme Court to reach the issue of whether the 1838 Treaty of Buffalo Creek disestablished the Reservation and the attempt (Cont'd)

Appendix B

Oneida County follows a tax foreclosure process set forth in Chapter 559 of the Laws of 1902, as amended ("the County Tax Law"). (Yerdon Aff. of Regularity P3.) Tax bills are distributed to property owners in December, covering taxes for the following year. *Id.* P4. The tax bill becomes a lien as of January 1. *Id.* The taxes are due by January 31. *Id.* Beginning on February 1, interest and penalties begin to accrue. *Id.* The tax bill shows outstanding amounts owed from the previous year in addition to the current year's taxes. *Id.* Although not required by the County Tax Law, in February a delinquent notice is sent to each taxpayer whose bill has not been paid. *Id.* P5.

Pursuant to the County Tax Law, whenever a tax remains unpaid for six months, the County Treasurer advertises and sells the parcel. *Id.* P6. After the expiration of the six months, a notice is published in a local newspaper once a week for six weeks specifying a "tax sale date" on which the tax liens will be sold at tax auction. *Id.* P7. The County Treasurer then prepares certificates of sale for all parcels purchased. *Id.* Ordinarily the required newspaper notices are published in November and December, after which proof of publication is filed with the Oneida County Clerk. *Id.* P8. The tax sale is then held on the last business day of

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(Cont'd)

by Stockbridge to intervene with regard to the six-mile-square property reserved to it. (*See* Def.'s Resp. to Statement of Undisputed Facts.) However, Oneida County has not made a citation to the record which would establish a dispute as to this fact.

December. *Id.* The Commissioner of Finance is authorized to purchase all such liens at the tax sale without offering for public bid. *Id.* P9.

This procedure was followed with regard to each of the Nation's parcels. *Id.* P10. Specifically, unpaid tax bills were levied with penalties and interest, notices of the tax sale were published, proof of publication was filed, Oneida County bid on all parcels at the tax sale, and certificates of sale were created. *Id.*

After the date of the sale, the County Tax Law provides that the property may be redeemed "for any real estate taxes sold at any time within one year thereafter by paying the sum of $1.00, plus the principal amount of taxes due, together with statutory penalties and interest." *Id.* P11. The County Tax Law also provides that not more than three months prior to the expiration of the allowable redemption period (the "Redemption Deadline"), the County Treasurer publishes a weekly notice for three consecutive weeks in a local newspaper. *Id.* P23. Proof of publication is then filed. *Id.* P13. The notices of redemption are generally published in October. *Id.* P14.

Although the Redemption Deadline is one year after the tax sale, Oneida County provides an additional two-year redemption period. *Id.* P15. At the end of the three-year period, a Final Notice Before Redemption is prepared. *Id.* P18. The Final Notice Before Redemption gives the recipient an additional thirty days within which to redeem the property by tendering payment of the

outstanding taxes and penalties owed. *Id.* The Final Notice Before Redemption is generally transmitted by certified mail to all interested parties. *Id.* At the expiration of the thirty-day allowable redemption period, the County Treasurer executes and delivers a conveyance of the parcel to the certificate holder, in this case, Oneida County. *Id.* P23.

On June 3, 2005, the Deputy Commissioner of Finance personally delivered Final Notices Before Redemption (dated June 1, 2005) to the Nation, with regard to 59 parcels. *Id.* P19. The notices stated that the redemption period ended on July 29, 2005. Deeds were executed on June 17, 2005, purportedly conveying the properties to the Oneida County Board of Legislators to be held in trust for the County. This action was then commenced by the Nation seeking to prevent Oneida County from pursuing foreclosure and conveyance of Nation lands. On August 1, 2005, the parties reached an agreement pursuant to which the Nation remitted $ 650,000.00 to Oneida County, in exchange for extension of the redemption period for the 59 parcels[2] through the completion of this litigation. (Carvelli Aff. Ex. A.)

On September 26, 2005, the Deputy Commissioner of Finance for Oneida County delivered additional Final Notices Before Redemption to the Nation covering 62 parcels. These notices, dated September 21, 2005, set a final redemption date of October 29, 2005. Again on

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2. At some point the Nation redeemed six of these parcels.

October 27, 2005, Final Notices Before Redemption covering 66 parcels were delivered to the Nation. (Yerdon Aff. of Regularity P20.) As noted above, on October 28, 2005, the Nation sought and obtained a restraining order preventing further foreclosure efforts, which continues in effect by stipulation of the parties.

III. *SUMMARY JUDGMENT STANDARD*

Summary judgment must be granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986). The moving party carries the initial burden of demonstrating an absence of a genuine issue of material fact. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). Facts, inferences therefrom, and ambiguities must be viewed in a light most favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

When the moving party has met the burden, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 586, 106 S. Ct. at 1356. At that point, the nonmoving party "must set forth specific facts showing that there is a genuine

issue for trial." Fed. R. Civ. P. 56; *Liberty Lobby, Inc.*, 477 U.S. at 250, 106 S. Ct. at 2511; *Matsushita Elec. Indus. Co.*, 475 U.S. at 587, 106 S. Ct. at 1356. To withstand a summary judgment motion, sufficient evidence must exist upon which a [*289] reasonable jury could return a verdict for the nonmovant. *Liberty Lobby, Inc.*, 477 U.S. at 248-49, 106 S. Ct. at 2510; *Matsushita Elec. Indus. Co.*, 475 U.S. at 587, 106 S. Ct. at 1356.

IV. *DISCUSSION*

A. *Summary Judgment*

The parties propound four bases upon which each argues it is entitled to summary judgment regarding foreclosure. There also are contrary arguments regarding the propriety of imposing penalties and interest. Each will be discussed seriatim.

1. Nonintercourse Act, 25 U.S.C. § 177

The "Nonintercourse Act restricts the alienation of Indian land without Congressional approval." *Madison County*, 401 F. Supp. 2d. at 228 (citing *Sherrill*, 544 U.S. 197, 125 S. Ct. at 1484 & n. 2, 161 L. Ed. 2d 386). The reasoning set forth in the Madison County case, *id.* at 227-28, applies here as well.[3] Accordingly, the

3. Oneida County's argument that the Madison County decision is inapposite here because it was wrongly decided is not well taken. Determining the correctness of that decision now lies within the purview of the Second Circuit.

Nonintercourse Act precludes Oneida County from foreclosing upon the parcels at issue here (the Nation's land) and summary judgment will be granted to the Nation.

2. Tribal Sovereign Immunity

The Nation is a federally recognized Indian Tribe which has not waived its sovereign immunity with regard to its real property. Further, Congress has not abrogated that immunity with regard to the Nation's real property. The reasoning in the Madison County case, *id.* at 228-30, also applies with regard to properties located in Oneida County. Thus, sovereign immunity bars any suit against the Nation, including one to foreclose upon its property.

3. Due Process

The Nation argues it was not provided due process in the notification procedure regarding redemption followed by Oneida County. It contends that less than two months notice (from the date the Final Notices Before Redemption were served upon it until the end of the redemption period) failed to comport with due process although this notice procedure was apparently in compliance with the County Tax Law. In fact, according to Oneida County, the only notice of the redemption period, prior to the Final Notice Before Redemption, was by publication in a local newspaper. The Nation contends that notice of the redemption deadline must have been served upon it at the beginning

of the redemption period in order to provide the process that was due. Oneida County argues to the contrary that as long as it complied with the notice requirements of the County Tax Law, due process is provided.

It is a requirement of due process that a property owner be properly notified of a tax sale and redemption period. *City of Sherrill*, 145 F. Supp. 2d at 257 (citing *McCann v. Scaduto*, 71 N.Y.2d 164, 176, 519 N.E.2d 309, 524 N.Y.S.2d 398 (N.Y. Ct. App. 1987); *Yagan v. Bernardi*, 256 A.D.2d 1225, 1226, 684 N.Y.S.2d 117 (N.Y. App. Div. 4th Dep't 1998)). In *McCann*, the applicable county code provided that a tax lien resulted from unpaid taxes, and that a date for the sale of the tax liens be set. 71 N.Y.2d at 170. Notice of the tax lien sale date was by publication. *Id.* A two-year redemption period followed the tax lien sale. *Id.* Additional notices by publication were required. *Id.* If the tax lien was not redeemed within twenty-one months, the tax lien purchaser was required to serve upon the owner and other specified parties, by certified mail return receipt requested, a notice to redeem within three months. *Id.* at 171. The Court of Appeals of New York found that this statutory scheme failed to provide due process because owners had not been given actual notice of the tax lien sale and redemption period. *Id.* at 177. Specifically, the *McCann* Court found that actual notice three months prior to the end of the redemption period was insufficient. *Id.* Rather, the court determined, in line with the legislatively-designed redemption period, that actual notice of the tax lien sale must be given. *Id.*

Here Oneida County applies a three-year redemption period to all tax liens. However, only notice by publication is provided regarding the tax lien sale and redemption period. Oneida County does not provide actual notice to the landowner until thirty days prior to the end of the redemption period. This mechanism is strikingly similar to the one held unconstitutional in *McCann*. *See* 71 N.Y.2d at 177-78. The major difference is that here actual notice is given thirty days prior to the end of the redemption period, whereas in *McCann* actual notice was given three months before the redemption period ended. Accordingly, Oneida County's mechanism under the County Tax Law fails to provide due process. Failure to provide actual notice to the Nation of the tax lien sale and the redemption period, at the beginning of the redemption period, violates the Nation's right to due process and it is entitled to summary judgment on this basis.

4. State Law

The Nation contends that its real property within the Reservation is not taxable pursuant to N.Y. Real Prop. Tax Law § 454 and N.Y. Indian Law § 6. Oneida County argues that abstention should apply with regard to issues of state tax law. As with the discussion regarding the Nonintercourse Act, the parties' arguments with regard to state law mirror those arguments made in the Madison County case. Thus, the reasoning set forth there applies here, *see* 401 F. Supp. 2d at 231, and repetition is unnecessary. Similarly, the previous analysis applies to Oneida County's argument

regarding abstention. *See id.* at 224-25. Oneida County is not entitled to summary judgment based upon abstention, and the Nation is entitled to summary judgment based upon state law.

5. Penalties and Interest

Oneida County argues that penalties and interest may be levied on the subject parcels, relying upon the *Sherrill* holding that there is no immunity from taxes. *See* 125 S. Ct. at 1489-90. Oneida County also relies upon the fact that it followed state law in assessing the interest and penalties. The Nation argues that equitable principals must be applied to preclude assessment of penalties and interest for nonpayment of taxes for the period prior to the *Sherrill* decision of March 29, 2005, when taxes were not known to be due.[4]

During the time period in which Oneida County assessed penalties and interest it was the law in this Circuit that these parcels were tax exempt. *See City of Sherrill, N.Y.*, 145 F. Supp. 2d at 266 (holding that Nation-owned property within the Reservation is non-taxable); 337 F.3d at 167 (affirming the lower court holding regarding non-taxability of Nation land). It would be inequitable to permit Oneida County to assess

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4. The Nation also urges that equity requires that the monies it gave to localities in Silver Covenant Chain Grants during the period prior to the *Sherrill* decision be used to set off any tax assessments. However, the amount of taxes due is not at issue in this action. Accordingly, the issue regarding Silver Covenant Chain Grants will not be reached.

interest and penalties for non-payment of taxes during a time when it was the law that the lands were not taxable. *See Hecht v. Gertler*, 204 A.D.2d 322, 323-24, 611 N.Y.S.2d 286 (N.Y. App. Div. 2d Dep't 1994) (modifying a lower court order that retroactively assessed penalties); *LaFayette Cent. Sch. Dist. v. Niagara Mohawk Power Corp.*, 129 A.D.2d 989, 989-90, 514 N.Y.S.2d 297 (N.Y. App. Div. 4th Dep't 1987) (modifying a lower court order imposing interest on taxes accrued when an exemption from such taxes was in effect, although the exemption was later found to have been improper). It is also notable that Oneida County cites no authority for the proposition that interest and penalties may be imposed for non-payment of taxes that were only later found to have been due at the earlier time. Accordingly, equity precludes the imposition of interest and penalties for the period prior to March 29, 2005, and the Nation is entitled to summary judgment on this basis.

B. *Declaratory and Injunctive Relief*

Again, the previous analysis balancing benefit and harm applies here, *see id.* at 231-32, weighing in favor of granting the Nation declaratory and injunctive relief. Oneida County argues that it will be irreparably harmed by the Nation's "accelerating number of properties acquired" and their refusal to pay taxes owed. (Def.'s Mem. at 21.) It also contends that a checkerboard of jurisdiction is contrary to the public interest. As was previously noted in the Madison County case, Oneida County must find an alternative method, other than

foreclosure, to obtain the taxes owed. *See* 401 F. Supp. 2d at 232. Moreover, the question of a jurisdictional checkerboard is to be resolved in the Nation's pending land trust application. The Nation is entitled to declaratory and injunctive relief.

C. *Motion to Intervene*

Stockbridge moves to intervene pursuant to Fed. R. Civ. P. 24(a). The purpose of Stockbridge's proposed intervention is solely to obtain dismissal of this action to the extent any parcels at issue here overlap with its (purported) six-mile-square reservation. (Stockbridge Mem. at 3.)

Pursuant to Rule 24(a) intervention as of right is appropriate, upon a timely application, when a federal statute "confers an unconditional right to intervene" or if the proposed intervener "claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." *Id.*

As noted, Stockbridge's asserted interest in this action is to obtain dismissal of any claim related to parcels that are within its claimed reservation. However, it specifically reserves its sovereign immunity with regard to any claim to the six-mile-square reservation land. Thus, if Stockbridge was permitted to intervene

and dismissal of the desired claims was granted, Oneida County would proceed with its foreclosure action and divest the Nation of title to the applicable parcels. However, the Nation is precluded from making any claim to the six-mile-square reservation land because of Stockbridge's sovereign immunity. This anomalous result demonstrates Stockbridge's lack of interest in this litigation. If it obtained the relief it seeks—dismissal of claims regarding parcels within the six-mile-square area—only the Nation's and Oneida County's interests would be affected. In fact, Stockbridge recognizes that its purported ownership interest in the six-mile-square area is being litigated in the land claim action also currently pending. (Stockbridge Mem. at 2 (referencing Civil Action No. 86-CV-1140).) Accordingly, Stockbridge does not qualify to intervene pursuant to Fed. R. Civ. P. 24(a), and its motion to do so will be denied.

V. *CONCLUSION*

The remedy of foreclosure is not available to Oneida County pursuant to the Nonintercourse Act, 25 U.S.C. § 177, N.Y. Real Prop. Tax Law § 454, and N.Y. Indian Law § 6. Notification by mail to the Nation of the end of the redemption period less than two months before its expiration failed to provide the Nation the process it was due; therefore, Oneida County cannot proceed with the foreclosures. Tribal sovereign immunity also insulates the Nation from any foreclosure action. Equity precludes the imposition of penalties and interest for taxes unpaid during a time when the properties were tax-exempt under the law. The Nation is entitled to the

declaratory and injunctive relief it seeks. Finally, Stockbridge has no interest in this action and therefore is not entitled to intervene as of right.

In conclusion, it would be wise for all sides to ponder the words of President Abraham Lincoln in his annual message to Congress on December 1, 1862. The words still ring true today.

> Fellow citizens, *we* cannot escape history. We . . . will be remembered in spite of ourselves. No personal significance, or insignificance can spare one or another of us. The . . . trial through which we pass, will light us down, in honor or dishonor, to the latest generation. . . .
>
> The dogmas of the quiet past, are inadequate to the . . . present. . . . We must think anew, and act anew. We must disenthrall ourselves.

If the last words are heeded, and the parties resolve the many land claim issues with good will and friendship between nations, the citizens of this time and place will be remembered by future generations with admiration and gratitude. In the alternative, future generations will still be coping with an endless stream of federal and state lawsuits, land claims, and land trust applications.

Accordingly, it is

ORDERED that

1. The Oneida Indian Nation's motion for summary judgment is GRANTED;

2. Oneida County's cross-motion for summary judgment is DENIED;

3. The motion by the Stockbridge-Munsee Band of Mohican Indians to intervene is DENIED;

4. Oneida County is permanently enjoined from any attempt to foreclose on Oneida Indian Nation property or in any other way alter title to Oneida Indian Nation property;

5. Oneida County is permanently enjoined from assessing and/or collecting penalties and interest on unpaid taxes prior to March 29, 2005, against the Oneida Indian Nation; and

6. Oneida Indian Nation's reservation was not disestablished.

The Clerk of the Court is directed to enter judgment accordingly.

IT IS SO ORDERED.

David N. Hurd

United States District Judge

Dated: June 2, 2006

Utica, New York.

APPENDIX C — MEMORANDUM DECISION AND ORDER AND PERMANENT INJUNCTION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK (OCTOBER 27, 2005)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

5:00-CV-506

ONEIDA INDIAN NATION OF NEW YORK,

Plaintiff,

vs

MADISON COUNTY,

Defendant.

October 27, 2005, Decided

JUDGES: DAVID N. HURD, United States District Judge.

OPINION BY: DAVID N. HURD

OPINION

Appendix C

MEMORANDUM-DECISION and ORDER and PERMANENT INJUNCTION

A Nation may be said to consist of its territory, its people, and its laws. The territory is the only part which is of certain durability.

President Abraham Lincoln

Annual Message to Congress

December 1, 1862

A district court should not permit the taking of a sovereign nation's land against its will by foreclosure or any other means, without the express approval of the United States Government. In this country such an extraordinary remedy—taking a sovereign nation's land against its will—has never been legally sanctioned.

I. INTRODUCTION

On June 7, 2005, plaintiff Oneida Indian Nation of New York ("the Nation") filed a motion for summary judgment. Defendant Madison County ("the County") opposed and cross-moved for summary judgment pursuant to Fed. R. Civ. P. 56. The County also filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), which the Nation opposed. New York State, as amicus curiae, filed a brief in support of the County. Oral argument was heard on September 7, 2005, in Utica, New York. Decision was reserved.

II. BACKGROUND

The Nation filed this action seeking to prevent the County from assessing and enforcing property taxes against Nation-owned property. On June 4, 2001, a Memorandum-Decision and Order issued in this and related cases holding, inter alia, that the lands at issue "are Oneida Reservation lands and therefore are Indian Country . . . . As Indian Country, the properties are not subject to taxation" by the County. *Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*, 145 F. Supp. 2d 226, 266 (N.D.N.Y. 2001).[1] In addition, the County was enjoined and restrained "from taking any act to impose property taxes upon, or to collect property taxes with respect to" thirteen parcels that were the subject of a 1999 foreclosure action. *Id.* at 267-68. A judgment was entered accordingly. Pursuant to a mandate issued by the United States Court of Appeals for the Second Circuit, the judgment was vacated. *Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*, 337 F.3d 139, 171 (2d Cir. 2003). The Second Circuit found that the record before it was incomplete as to whether the Madison County parcels "were part of the Oneidas' historical reservation." *Id.* Accordingly, the matter was remanded for further proceedings. *Id.*

The United States Supreme Court granted certiorari in the companion cases. *City of Sherrill v. Oneida Indian Nation*, 542 U.S. 936, 124 S. Ct. 2904 (2004). The Court rejected "the unification [of fee and

1. The subsequent history for this case is set forth in the following text.

aboriginal title] theory" and held "that 'standards of federal Indian law and federal equity practice' preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." 544 U.S. 197, 161 L. Ed. 2d 386 (2005) ("Sherrill"). Stated another way, the Court held "that the Oneida Indian Nation is not now immune from the taxing authority of local government." *Id.* at 1494 (Souter, J., concurring). Rehearing was denied.[2] 125 S. Ct. 2290, 161 L. Ed. 2d 1103 (2005).

III. FACTS

An extensive background of facts is set forth in the prior decisions, familiarity with which is assumed. See 337 F.3d at 144-53; 145 F. Supp. 2d at 232-36. Only the facts necessary for resolution of the motions are set forth below. The following facts are undisputed unless otherwise noted.

Since the late 1990s the Nation has been reacquiring properties in the County and elsewhere. The Nation currently owns 113 parcels in the County. There is now no dispute that all are within the boundaries of the reservation as described in the Treaty of Ft. Schuyler and the Treaty of Canandaigua.

The County assessed taxes against Nation-owned parcels, and included the parcels in its yearly foreclosure actions in state court. It was the County's practice to

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2. The City of Sherrill and the Nation reached a settlement and filed a Compact and Stipulation of Dismissal on October 18, 2005.

then withdraw the parcels owned by the Nation, in anticipation of a resolution of the taxability question in Sherrill.

The County assessed 2003 taxes against ninety-eight parcels. These parcels were included in the County's 2003 foreclosure action. However, the County did not withdraw Nation-owned properties from the foreclosure action, as had been its practice. The County instituted a foreclosure action in state court on November 14, 2003. The Petition and Notice of Foreclosure was published in December 2004 and January 2005, and was mailed to the subject parcel owners, including the Nation, on December 8, 2004. The specified last day for redemption of these ninety-eight Nation-owned parcels was March 31, 2005.

The Supreme Court decided Sherrill on March 29, 2005, resolving the issue of taxability of reacquired Nation property. On April 28, 2005, the County filed a motion for summary judgment in the 2003 state court foreclosure action. If successful on the motion, possession and title to the properties would be awarded to the County. Accordingly, a preliminary injunction issued enjoining the County from proceeding with the foreclosure action. *Oneida Indian Nation of N.Y. v. Madison County*, 376 F. Supp. 2d 280, 283 (N.D.N.Y. 2005).

Appendix C

IV. DISCUSSION

A. Standards

1. Motion to Dismiss

A cause of action shall not be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99, 102 (1957). In considering a motion brought pursuant to Fed. R. Civ. P. 12(b), the court must assume all of the allegations in the complaint are true. Id. In reviewing the sufficiency of a complaint at the pleading stage, "the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683, 1686 (1974).

Where a motion to dismiss is made prior to any discovery or the filing of an answer, the court is loath to dismiss the complaint, regardless of whether the plaintiff is unlikely to prevail, unless the defendant can demonstrate that plaintiff is unable to prove facts which would entitle him to relief. *Wade v. Johnson Controls, Inc.*, 693 F.2d 19, 22 (2d Cir. 1982); see also *Egelston v. State Univ. College at Geneseo*, 535 F.2d 752, 754 (2d Cir. 1976).

2. Summary Judgment

Summary judgment must be granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505, 2509-10 (1986). The moving party carries the initial burden of demonstrating an absence of a genuine issue of material fact. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548, 2552 (1986). Facts, inferences therefrom, and ambiguities must be viewed in a light most favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348, 1356 (1986).

When the moving party has met the burden, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 586, 106 S. Ct. at 1356. At that point, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56; *Liberty Lobby, Inc.*, 477 U.S. at 250, 106 S. Ct. at 2511; *Matsushita Elec. Indus. Co.*, 475 U.S. at 587, 106 S. Ct. at 1356. To withstand a summary judgment motion, sufficient evidence must exist upon which a reasonable jury could return a verdict for the nonmovant. *Liberty Lobby, Inc.*, 477 U.S. at 248-49, 106 S. Ct. at 2510; *Matsushita Elec. Indus. Co.*, 475 U.S. at 587, 106 S. Ct. at 1356.

B. Analysis

1. County's Motion to Dismiss

The County asserts the doctrine of abstention and lack of subject matter jurisdiction (due to the "prior-exclusive-jurisdiction" rule applicable to in rem proceedings) as bases for dismissal. It is therefore appropriate to first address the County's motion to dismiss.

a. Abstention

The doctrine of abstention may be applied by a federal court to "decline to exercise or postpone the exercise of its jurisdiction" when the same issue is also presented in a state court with concurrent jurisdiction. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 47 L. Ed. 2d 483, 96 S. Ct. 1236, 1244 (1976). However, "'it is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.'" *Id.* (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89, 3 L. Ed. 2d 1163, 79 S. Ct. 1060, 1063 (1959)). Abstention is appropriate "'only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.'" *Id.* (quoting *County of Allegheny*, 360 U.S. at 188-89, 79 S. Ct. at 1063). Additionally, a federal court should never abstain from a suit "'merely because a State court could entertain it.'" *Id.* at 813-14, 96 S. Ct. at 1244 (quoting *Alabama*

Pub. Serv. Comm'n v. Southern R. Co., 341 U.S. 341, 361, 95 L. Ed. 1002, 71 S. Ct. 762, 774 (1951) (Frankfurter, J., concurring in result)). Abstention may be applied in only three categories of cases. *Id.* at 814, 96 S. Ct. at 1244.

The first category of cases to which the abstention doctrine may be applied is those "'cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.'" *Id.* (quoting *County of Allegheny*, 360 U.S. at 189, 79 S. Ct. at 1063). The only federal constitutional question presented here is whether the notice provided to the Nation of the impending foreclosure constituted due process. This issue would not be mooted by a decision in the state action. A state court determination of pertinent state law would not result in presentation of this issue in a different posture. See *id.* Accordingly, this case does not fit within the first category of cases to which abstention might be appropriate. See *id.*

The next category of cases are those "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Id.* At issue here are the federal questions of application of a federal statute (the Nonintercourse Act), Tribal sovereign immunity, and due process. There is no "difficult question[ ] of state law" presented. See *id.* Thus, this case also does not fit within the second category.

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The third and final category of cases in which abstention might be appropriate is those cases "where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, state nuisance proceedings . . . directed at obtaining the closure of places exhibiting obscene films, or collection of state taxes." *Id.* at 816, 96 S. Ct. at 1245-46. This clearly is not a case involving restraint of a state criminal proceeding, nor does it involve a nuisance closing of a place due to obscenity. See *id.* Further, the issue of taxation of the property by the state was resolved in Sherrill. See 125 S. Ct. at 1494 (Souter, J., concurring) (reiterating the majority's holding that the Nation "is not now immune from the taxing authority of local government"). Accordingly, this case does not fit within the third and final category of cases to which the doctrine of abstention applies. See *Colorado River*, 424 U.S. at 816-17, 96 S. Ct. at 1246.

b. Jurisdiction

Although the doctrine of abstention is not applicable in the present case, other principles grounded in judicial efficiency "govern in situations involving the contemporaneous exercise of concurrent jurisdictions." *Id.* at 817, 96 S. Ct. at 1246. "Generally, as between state and federal courts, the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *Id.* (quoting *McClellan v. Carland*, 217 U.S. 268, 282, 54 L. Ed. 762, 30 S. Ct. 501, 505 (1910)).

Appendix C

Federal district courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Id.* Thus, circumstances in which a federal court action should be dismissed for reasons of judicial efficiency in the face of a concurrent state court proceeding are "considerably more limited than the circumstances appropriate for abstention." *Id.* at 818, 96 S. Ct. at 1246.

In considering whether dismissal for reasons of judicial efficiency is appropriate when there is concurrent jurisdiction in a state court, factors such as "the inconvenience of the federal forum, the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums" may be assessed. *Id.*, 96 S. Ct. at 1247 (internal citations omitted). A court must carefully consider "both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise" when determining whether to dismiss the case. *Id.* No single factor is determinative, and "only the clearest of justifications will warrant dismissal." *Id.* at 818-19, 96 S. Ct. at 1247.

Here there is no inconvenience in continuing to proceed with this federal court action. The action has been pending since March 30, 2000. Proceedings have occurred over the five-plus years of its pendency. While state court proceedings were also initiated some years ago, they were held in abeyance at the choice of the parties pending resolution in this and the related Sherrill cases. Thus, avoiding piecemeal litigation will be furthered by maintaining the proceedings here.

Moreover, although a state court proceeding was initiated in 1999 (as well as those initiated in later years), the order in which jurisdiction was obtained does not favor dismissal of the federal court action since the first-filed state court action was held in abeyance pending resolution of this matter. In short, there are no factors "counseling against the exercise" of federal jurisdiction in this action. See *id.* at 818-19, 96 S. Ct. at 1247. There is no clear justification warranting dismissal. *See id.* at 819, 96 S. Ct. at 1247.

The only other circumstance in which it would be appropriate to dismiss the federal court action based upon considerations of judicial administration would be where the court in the concurrent actions must exercise jurisdiction over the same property. *Id.* at 818, 96 S. Ct. at 1246 (citing *Donovan v. City of Dallas*, 377 U.S. 408, 412, 12 L. Ed. 2d 409, 84 S. Ct. 1579, 1582 (1964)). In that instance, the "state or federal court having custody of such property has exclusive jurisdiction to proceed." *Donovan*, 377 U.S. at 412, 84 S. Ct. at 1582 (citing *Princess Lida v. Thompson*, 305 U.S. 456, 465-68, 83 L. Ed. 285, 59 S. Ct. 275, 281 (1939)).

Thus, once a state court has taken jurisdiction of the res that is the subject of a state court in rem proceeding, a federal court cannot also exercise jurisdiction of the res. *Donovan*, 377 U.S. at 412, 84 S. Ct. at 1582; *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229, 43 S. Ct. 79, 81, 67 L. Ed. 2d 226 (1922). The converse is also true. *Kline*, 260 U.S. at 229, 43 S. Ct. at 81. However, this "first-filed" rule is applicable only to

in rem proceedings and is not applicable to in personam actions. *Donovan*, 377 U.S. at 412, 84 S. Ct. at 1582; *Kline*, 260 U.S. at 230, 235, 43 S. Ct. at 81, 83. This is so because although a state and federal court may have concurrent jurisdiction, "both courts cannot possess or control the same thing at the same time." *Kline*, 260 U.S. at 235, 43 S. Ct. at 83. Based upon this principle, the rule of comity developed prudentially limiting exercise of "in rem jurisdiction over a res that is already under the in rem jurisdiction of another court." *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142, 1145 (9th Cir. 1989) (citing *Penn Gen. Casualty Co. v. Pennsylvania*, 294 U.S. 189, 195, 79 L. Ed. 850, 55 S. Ct. 386, 389 (1935)). In other words, prior assumption of jurisdiction over a res by a state court creates an exceptional circumstance in which it may be proper for a federal court to decline to exercise its jurisdiction, as set forth in Colorado River. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19, 74 L. Ed. 2d 765, 103 S. Ct. 927, 938-39 (1983) (applying Colorado River to the facts of the case to find that no exceptional circumstances justified staying the federal action).

Here, the state court proceeding is an in rem foreclosure action. However, this federal court proceeding is in personam. This in personam action in federal court is not foreclosed by the state court in rem proceeding. See *York Hunter Constr. v. Avalon Props., Inc.*, 104 F. Supp. 2d 211, 215 (S.D.N.Y. 2000) (restating Second Circuit law "that federal district courts may adjudicate matters that indirectly relate to the state's

exercise of in rem jurisdiction" and the state court must follow the federal court's adjudication regarding the rights at issue); *United States v. $ 3,000,000 Obligation of Qatar Nat'l Bank*, 810 F. Supp. 116, 118 (S.D.N.Y. 1993) (citing and quoting *Fischer v. American United Life Ins. Co.*, 314 U.S. 549, 554, 86 L. Ed. 444, 62 S. Ct. 380, 383 (1942) for the proposition that "a state or federal court 'may properly adjudicate rights in property in possession' of another court").

Based upon the foregoing, this action need not be dismissed based upon the doctrine of abstention or because there is a state court in rem proceeding.

2. Motion and Cross-motion for Summary Judgment

The Nation propounds three bases upon which it is entitled to summary judgment for injunctive and declaratory relief. The County relies upon Sherrill in opposition to the Nation's motion and on behalf of its cross-motion for summary judgment. The following analysis demonstrates that there are four independent bases supporting summary judgment in favor of the Nation: the Nonintercourse Act, Tribal sovereign immunity, due process, and state law.

a. Nonintercourse Act, 25 U.S.C. § 177

Section 177 of Title 25 of the United States Code prohibits the "purchase, grant, lease, or other conveyance" of land from "any Indian nation or tribe of

Indians" unless it is pursuant to a "treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177. In other words, land owned by an Indian nation is inalienable (except with the approval of Congress, a circumstance not present here). See *id.* Proceeding with the state court foreclosure would result in the transfer of title to land owned by the Nation to the County—alienation of Indian land. This is precisely what is prohibited by the Nonintercourse Act.

The County addresses the Nonintercourse Act only in a footnote in its memorandum. It contends that the Nation advanced the Nonintercourse Act argument before the Supreme Court in Sherrill but was unsuccessful. The County suggests that by its holding that the Nation is precluded by equitable principles from the remedy of tax immunity, the Supreme Court rejected the Nonintercourse Act argument. However, nothing in Sherrill explicitly or implicitly rejects the validity of the Nonintercourse Act or its applicability with regard to the land in question. The Court acknowledged that the Nonintercourse Act restricts the alienation of Indian land without Congressional approval. *See* 125 S. Ct. at 1484 & n.2 (stating that "the Act bars sales of tribal land without the acquiescence of the Federal Government"). The Court also discussed the history of claims relating to illegal dispossession of land from the Indians in this region, all based upon a violation of the Nonintercourse Act. See *id.* at 1486-89. In each action discussed the Indians were successful in their claim for some sort of recompense for the wrongful dispossession, with a single exception. *Id.* That exception pertained to lands ceded

to New York State under treaties in 1785 and 1788, under the Articles of Confederation, id. at 1488 n.4, prior to passage of the first Nonintercourse Act in 1790. The lack of success on that claim was not attributable to inapplicability of the Nonintercourse Act.

The Supreme Court in Sherrill simply foreclosed the Nation from obtaining the remedy of immunity from taxes. *Id.* at 1494. It noted, in response to the dissent's suggestion that tax immunity could be asserted defensively, that the "equitable cast of the relief sought remains the same whether asserted affirmatively or defensively." *Id.* at 1489 n.7. This does not address the issue of alienability. It merely suggests that the Nation is foreclosed from asserting immunity from taxes as a defense. See *id.*

The Nonintercourse Act, in plain language, prohibits the conveyance of lands from any Indian nation. The foreclosure sought by the County would be a conveyance of lands from the Nation. Accordingly, the foreclosure is prohibited by the Nonintercourse Act.

Similarly, the finding that the land is taxable does not mean that it is subject to foreclosure. Implicit permission to foreclose as read into the Sherrill decision by the County is simply insufficient to authorize such a drastic remedy.

Just as the Nation is precluded from its chosen remedy—tax immunity, so is the County precluded from its chosen remedy—foreclosure. The former preclusion

is derived from "standards of federal Indian law and federal equity practice" that "evoke the doctrines of laches, acquiescence, and impossibility." *Id.* at 1489-90, 1494. The latter preclusion is derived from a federal statute, the meaning of which is clear and unambiguous. See 25 U.S.C. § 177. While it has been and will be said that it is unfair and will work a hardship on the citizens of the County to preclude the remedy of foreclosure, so too some will say that it is unfair to the members of the Nation whose tens of thousands of acres of land were illegally taken from them to preclude their tax immunity remedy.

b. Tribal Sovereign Immunity

"Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509, 112 L. Ed. 2d 1112, 111 S. Ct. 905, 909 (1991) (quoting *Cherokee Nation v. Georgia*, [30 U.S. 1], 5 Pet. 1, 17, 8 L. Ed. 25 (1831)). Accordingly, sovereign immunity bars suits against Indian tribes unless the tribe has clearly waived its immunity or the immunity has been abrogated by Congress. *Id.* (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 56 L. Ed. 2d 106, 98 S. Ct. 1670, 1677 (1978)). Further, "a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe." *Id.* (citing *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513, 84 L. Ed. 894, 60 S. Ct. 653, 656 (1940)).

Appendix C

The Nation is a federally recognized Indian tribe. The Nation has not waived its sovereign immunity with regard to its real property. Nor has Congress abrogated the Nation's immunity regarding the property it owns. More generally, "Congress has never authorized suits [against Indian tribes] to enforce tax assessments," although it "has occasionally authorized limited classes of suits." *Id.* at 510, 111 S. Ct. at 910. Thus, sovereign immunity bars suits against the Nation. *See id.* at 509, 111 S. Ct. at 909.

The County argues that Potawatomi is inapposite because that was an in personam suit against the tribe, while the tax foreclosure suit here is in rem. It is of no moment that the state foreclosure suit at issue here is in rem. What is relevant is that the County is attempting to bring suit against the Nation. The County cannot circumvent Tribal sovereign immunity by characterizing the suit as in rem, when it is, in actuality, a suit to take the tribe's property. *See Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 U.S. 751, 755, 140 L. Ed. 2d 981, 118 S. Ct. 1700, 1703 (1998) (explaining its holding in Potawatomi that Indian tribes are immune from suit to collect unpaid taxes, stating: "a difference [exists] between the right to demand compliance with state laws and the means available to enforce them"); *see also United States v. Nordic Village, Inc.*, 503 U.S. 30, 38, 117 L. Ed. 2d 181, 112 S. Ct. 1011, 1017 (1992) (rejecting the suggestion that there is any "in rem exception to the sovereign-immunity bar" in the context of a state's Eleventh Amendment sovereign immunity); *French v. Georgia Dep't of Revenue (In re ABEPP*

Acquisition Corp.), 215 B.R. 513, 516-17 (B.A.P. 6th Cir. 1997) (applying Nordic Village to reject the suggestion that the "bankruptcy court could burrow past" Eleventh Amendment immunity "by exercising in rem jurisdiction").

The County also contends that Potawatomi is inapposite because the sales of cigarettes at issue there occurred on land held in trust for the Potawatomis, whereas here, the properties are not reservation land. The County's assertion that the properties are not reservation land is based upon its interpretation of Sherrill. Even if the County's assertion were correct, it misapprehends Potawatomi. There Oklahoma argued that because the cigarette sales occurred on trust land rather than reservation land the normal rules of sovereign immunity should not apply. *Potawatomi*, 498 U.S. at 511, 111 S. Ct. at 910. The Court in Potawatomi refused to distinguish between trust land and reservation land. Id. The Court further noted that a case involving a ski resort operated by an Indian Tribe outside of a reservation was not to the contrary. *Id.* (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 36 L. Ed. 2d 114, 93 S. Ct. 1267 (1978)). In Mescalero the Court found that, in the absence of contrary federal law, the operation of the ski resort outside of the reservation was "held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Id.* (citing *Mescalero*, 411 U.S. at 148-49, 93 S. Ct. at 1270). Additionally, in Kiowa Tribe, the Court distinguished application of state substantive laws regarding off-reservation conduct with tribal immunity

from suit. 523 U.S. at 755, 118 S. Ct. at 1703. The Court held that the Kiowa Tribe was immune from a suit for breach of contract regardless of "whether those contracts involved governmental or commercial activities and whether they were made on or off a reservation." *Id.* at 760, 118 S. Ct. at 1705.

It is also notable that the Potawatomi Court rejected, on sovereign immunity grounds, Oklahoma's countersuit to enforce its $2.7 million claim for taxes assessed on the sale of cigarettes which the Tribe failed to pay. See *Potawatomi*, 498 U.S. at 507-09, 111 S. Ct. at 908-09. The Court also rejected Oklahoma's complaints that although it had a right (to assess a tax on sales of cigarettes to non-Indians) it had no remedy if the Tribe had sovereign immunity. *Id.* at 514, 111 S. Ct. at 912. The Court noted that although sovereign immunity might bar Oklahoma from the most efficient remedy, other remedies, such as an "agreement[] with the tribes to adopt a mutually satisfactory regime for the collection of" the tax, were available. *Id.*

As a subset of its claim that tribal sovereign immunity precludes the state tax foreclosure suit, the Nation contends that it is not subject to the imposition of penalties and interest, which amount to a state law fine against it. The County makes no argument in this regard. Therefore, it must be concluded that the County agrees that the imposition of penalties and interest was improper.

c. Due Process

It is a requirement of due process that a property owner be properly notified of a tax sale and redemption period. *City of Sherrill*, 145 F. Supp. 2d at 257 (citing *McCann v. Scaduto*, 71 N.Y.2d 164, 180, 519 N.E.2d 309, 524 N.Y.S.2d 398 (N.Y. Ct. App. 1987); *Yagan v. Bernardi*, 256 A.D.2d 1225, 1226, 684 N.Y.S.2d 117 (N.Y. App. Div. 4th Dep't 1998)). The time periods set forth in the regulatory scheme must be followed; shorter notice violates due process. *Id.* New York has a two-year general redemption period. N.Y. Real Prop. Tax Law § 1110 (McKinney 2000). The parties have not pointed out any different redemption period set by the County. Thus, in order to comport with due process the County must have given the Nation notice two years prior to expiration of the redemption period. *See City of Sherrill*, 145 F. Supp. 2d at 257.

The County first notified the Nation of the March 31, 2005, expiration of the redemption period on December 8, 2004. This is far less than the two years required to comport with due process. Additionally, at the time the notice was sent out the case law of this circuit held that these properties, reacquired by the Nation and within its reservation, were exempt from taxation. It was not until the Supreme Court decision of March 29, 2005, that the law changed making the properties taxable. Subsequently, the County extended the redemption period to June 3, 2005. Even considering the concededly earliest notification on December 8, 2004, and the latest expiration of the redemption period of

June 3, 2005, the County falls short of the two-year period required for notice by approximately eighteen months. Thus, the County failed to give timely notice of the redemption period expiration to the Nation, a due process violation.

The County relies upon *Akey v. Clinton County, N.Y.*, 375 F.3d 231 (2d Cir. 2004), in support of its position that notice to the Nation comported with due process. This reliance is untenable. The issue before the Akey Court was whether the means selected to make the notifications comported with due process. *Id.* at 235. The court stated that notice by mail, reasonably calculated to be received by the property owners, is sufficient to constitute due process. *Id.* In Akey, the question raised was whether the County's notice was reasonably calculated to reach the property owners given, for example, failure to do a complete search of public records to find an updated address after a notice of foreclosure was returned as undeliverable. *Id.* at 236. The timing of the notices was not in issue.

d. State Law

New York State Law provides that "real property in any Indian reservation owned by the Indian nation, tribe or band occupying them shall be exempt from taxation. "N.Y. Real Prop. Tax Law § 454; N.Y. Indian Law § 6 (McKinney 2001) (directing that no taxes be assessed upon Indian reservation lands). The Nation's "reservation was not disestablished." *City of Sherrill*, 337 F.3d at 167. The properties at issue are located

within the Nation's reservation. Pursuant to state law, taxes should not have been assessed against the Nation's properties and such properties are exempt from taxation. Therefore, the County's assessment of taxes upon the property and its attempts to foreclose for non-payment of such taxes is contrary to state law.

The County argues that relying upon the Second Circuit's holding that the reservation was not disestablished is contrary to the Supreme Court decision is Sherrill. The Supreme Court focused its decision on the requested remedy-tax immunity. See *Sherrill*, 125 S. Ct. at 1490 n.9. It explicitly declined to decide whether the Second Circuit erred in determining that the reservation was not disestablished. *Id.* Thus, the Second Circuit holding that the reservation was not disestablished remains undisturbed. Further, the Supreme Court's determination that federal equitable principles prevent the Nation from obtaining its requested remedy of tax immunity necessarily was predicated upon an assumption that the reservation was not disestablished. This is so because if the reservation was disestablished the lands would not be Indian Country and clearly would be subject to taxation. Under such circumstances the Supreme Court would not have needed to rely upon the equitable principles of laches, acquiescence, and impossibility to find the properties were subject to local taxation.

In sum, the Nation is entitled to summary judgment based upon each of the foregoing four separate and distinct reasons. The County is not entitled to summary judgment on its cross-motion.

3. Injunctive and Declaratory Relief

A party seeking injunctive relief must establish the inadequacy of any remedy at law and irreparable harm. *Northern Cal. Power Agency v. Grace Geothermal Corp.*, 469 U.S. 1306, 1307, 83 L. Ed. 2d 388, 105 S. Ct. 459, 460 (1984); *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 68 (2d Cir. 1999). In determining whether to exercise its discretion and grant equitable relief, a court must "weigh[ ] the potential benefits and harm to be incurred by the parties from the granting or denying of such relief." *Ticor Title*, 173 F.3d at 68 (citing *Yakus v. United States*, 321 U.S. 414, 440, 88 L. Ed. 834, 64 S. Ct. 660, 675 (1944)).

Here, it is clear that any remedy at law would be inadequate and irreparable harm would result if an injunction is not issued precluding the County from foreclosing on the Nation's properties. Monetary damages would be insufficient to remedy a foreclosure and change of title of the Nation's properties. Indeed, the Nation requested only injunctive and declaratory relief, not monetary relief. Additionally, the Nation would be irreparably harmed by the foreclosure and change of title of its properties. Finally, granting an injunction would mean that the County's remedy for the non-payment of taxes by the Nation would exclude foreclosure. Limitation of enforcement remedies is insufficient to justify overriding Tribal sovereign immunity. *See, e.g. Kiowa Tribe*, 523 U.S. at 755, 118 S. Ct. at 1703 (holding that although the state may tax sales to non-Indians, the Tribe was immune from a suit to

collect such taxes). Thus, a balance of the hardships weighs in favor of granting the injunction.

The Nation also seeks a declaration that its reservation was not disestablished. Given the Supreme Court determination that it need not review the Second Circuit's conclusion in this regard, 125 S. Ct. at 1490 n.9, the Second Circuit's holding that the reservation was not disestablished, 337 F.3d at 167, remains good law. Accordingly, the Nation is entitled to a declaration that its reservation was not disestablished.

V. CONCLUSION

The remedy of foreclosure is not available to the County. First, under the Nonintercourse Act, the Nation's properties are inalienable. Second, the Nation is immune from suit to collect unpaid property taxes. Third, the notice provided to the Nation of the date the redemption period expired failed to comport with due process because it was significantly shorter than two years. Fourth, the Second Circuit finding that the Nation's reservation was not disestablished was not abrogated by Sherrill and New York State law exempts reservation land from taxation. As a result, the Nation is entitled to the injunctive and declaratory relief it seeks.

The Nation owes real property taxes to the County. However, the County may not, in effect, seize lands owned by the Nation in order to collect those taxes. It must find an alternate method to satisfy the Nation's debt to the County.

There is a vast difference between requiring real property owned by a sovereign nation to be taxed and to comply with local zoning and land use regulations, and allowing ownership of real property to be seized from that sovereign nation. The seizing of land owned by a sovereign nation strikes directly at the very heart of that nation's sovereignty. In the face of Federal and State laws and the solemn treaty obligations of the United States, permitting the seizure of lands from a sovereign nation should require, at the very least, a specific Act of Congress.

This is obviously not the last word. There will undoubtedly be an appeal to the Second Circuit, and perhaps to the Supreme Court.[3] However, unless directed otherwise by legislation or judicial mandate, the seizure of land from a sovereign, against its will, will not occur as the result of a ruling from this forum.

Therefore, it is

ORDERED that

1. Madison County's motion to dismiss is DENIED;

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3. As in the Sherrill case, there is always the possibility of a settlement agreement between the parties. This would, of course, be the best final result. However, a settlement would require a spirit of cooperation and compromise on the part of both sides which heretofore has appeared to be sorely lacking. See 145 F. Supp. 2d at 231. Otherwise this and other federal and state litigation will continue into the indefinite future.

2. Oneida Indian Nation's motion for summary judgment is GRANTED;

3. Madison County's cross motion for summary judgment is DENIED;

4. Madison County is permanently enjoined from any attempt to foreclose on Oneida Nation property or in any other way alter title to Oneida Indian Nation property;

5. Madison County is permanently enjoined from assessing and/or collecting penalties and interest on unpaid taxes against the Oneida Indian Nation; and

6. Oneida Indian Nation's reservation was not disestablished.

The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

DAVID N. HURD

United States District Judge

Dated: October 27, 2005

Utica, New York.

OPPOSITION BRIEF

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(17)

No. 10-72

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IN THE

Supreme Court of the United States

MADISON COUNTY AND ONEIDA COUNTY, NEW YORK
Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTRODUCTION

This case involves the fundamental distinction between a Tribe's sovereign authority to govern land—which was at issue in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005)—and a Tribe's sovereign immunity from suit—which was not at issue in *Sherrill*. The Second Circuit in this case applied that basic distinction, following the decisions of this Court including *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998), and *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505 (1991). The United States as invited *amicus curiae* supported the Tribe's immunity from foreclosure, recognizing that the distinction between a sovereign's governance authority (over specific territory) and a sovereign's immunity from enforcement proceedings (an immunity not tied to particular territory) is well established and important outside as well as within Indian law. Neither this Court nor Congress has curtailed tribal sovereign immunity for tax foreclosures, and the Court has stressed that it is for Congress to make the policy judgments about any new limits on tribal sovereign immunity. The Second Circuit thus correctly upheld the Tribe's immunity from foreclosure proceedings that petitioners initiated to preempt the very process of placing land in federal trust that this Court pointed to in *Sherrill*.

No ground for certiorari is present here. Neither petitioners nor *amici* have cited a single other case that has even presented the question whether sovereign immunity protects tribal land from tax foreclosure, let alone resolved it in conflict with the Second Circuit. Nor is the issue of national

significance: petitioners and *amici* rely only on hypotheticals, not any actual tax foreclosure case involving tribal land.

This unique case—involving the immediate post-*Sherrill* transition and an attempt to preempt the federal-agency trust process –also is singularly undeserving of review to consider the judicial change of law petitioners seek. The United States has agreed to take most of the land at issue into federal trust, a decision pending judicial review for two years now. In connection with the trust process, the Oneida Nation has posted bank letters of credit covering all the land here at issue, not just the land approved for trust. The Counties have requested and can obtain a determination of taxes due under state law and that determination would guarantee payment (through private letters of credit) of any taxes held to be due, whether or not any trust is approved. There is, thus, no immunity impediment to petitioners' receiving all past taxes due. Prospectively, moreover, all land taken into trust will indisputably be immune from taxes. As to the remaining land, it would simply be inappropriate to presume that the traditional means of dispute resolution involving tribal sovereigns will prove unsuccessful. Indeed, the payment mechanism adopted in the trust process and the Oneida Nation's post-*Sherrill* tax agreements with localities other than petitioners, including the City of Sherrill, confirm the lack of any need suddenly to override the established sovereign immunity from enforcement actions.

The petition's immunity question thus does not merit review. Nor does the second question, which

the Second Circuit expressly declined to reach and which this Court declined to decide after full briefing in *Sherrill*.

STATEMENT

The judgments under review are permanent injunctions to prevent Petitioners Madison and Oneida Counties from foreclosing on land that the Oneida Nation applied to have taken into federal trust status following *Sherrill*. All of the land at issue is within the Oneida reservation acknowledged in the 1794 Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794), Pet. App. 36a (Oneida County parcels), 55a (Madison County parcels), and was reacquired by the Oneida Nation before this Court decided *Sherrill*. Since the district court enjoined the foreclosures, the federal government has agreed to take most of the land into trust. As part of the trust process, letters of credit now readily allow the Counties to obtain past taxes ruled to be due.

a. The *Sherrill* decision. On March 29, 2005, this Court held that the Oneida Nation did not regain sovereign governance authority over land by reacquiring it after long dispossession and therefore lacked the immunity from state land taxation that arises from such governance authority. 544 U.S. at 221. The Court pointed to the federal trust statute and an implementing regulation (25 U.S.C. § 465 and 25 C.F.R. § 151.10) as creating the "proper avenue" for the Oneida Nation to regain sovereignty over a portion of its federal treaty reservation. *Id.* The trust process, the Court explained, could best address the competing interests of the Oneida Nation and the local non-Indian community. *Id.*

b. The trust application. Within days of the *Sherrill* decision, the Oneida Nation filed a trust application with the Department of the Interior. CA App. A326. Petitioners Madison and Oneida Counties immediately opposed taking any land into trust. *Id.* A362-64. After a thorough review, based on an Administrative Record comprising tens of thousands of pages, on May 20, 2008, the Department agreed to take 13,004 acres of the Oneida Nation's 17,370 acres of land into trust. Pet. App. 12a; 73 Fed. Reg. 30144-46 (notice of agency determination).

Before granting the application, the Department directed the Oneida Nation to post, and the Oneida Nation did post, bank letters of credit securing payment of all taxes, penalties, and interest determined to be due on *all* Nation-owned parcels, not just those approved for trust status. *Id.* at 13a.[1] Because a private bank is obligated on the letters of credit, enforcement of the letters of credit raises no tribal sovereign immunity issue. Petitioners and others, including New York State, have sued to challenge the Department's trust decision.[2] In the

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[1] The Department required the letters of credit to cover only a portion of the taxes on the Oneida Nation's casino parcel because it concluded that a part of the tax violated the federal Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* The Department's decision (the "Record of Decision"), in § 7.5.4, requires a further letter of credit if a challenge to that conclusion is still pending when the Department formally accepts the land into trust.

[2] *See New York v. Salazar*, No. 08-cv-644 (N.D.N.Y., filed June 19, 2008); *Town of Verona v. Salazar*, No. 08-cv-647 (N.D.N.Y., filed June 19, 2008); *City of Oneida v. Salazar*, No. 08-cv-648 (N.D.N.Y., filed June 19, 2008); *Upstate Citizens for*

review proceeding, the Counties can obtain a determination of a critical state-tax-exemption issue (not addressed by the Second Circuit below) and hence a determination of liability for taxes, penalties, and interest, triggering the bank's payment of any amounts due—as to all the land at issue in the present case, not just the trust land, and regardless of whether the trust is approved. *See id.* at 13a; *id.* at 32a n.1 (Cabranes, J., concurring).[3]

Thus, no enforcement immunity stands in the way of the Counties' receiving any past taxes determined to be due. Prospectively, if Interior's trust decision is affirmed, most of the land (75% by acreage, 93% by assessed value) will be immune from taxation. 25 U.S.C. § 465.

c. The post-*Sherrill* tax disputes and the injunctions against foreclosure. The Oneida Nation successfully negotiated tax agreements with the Cities of Sherrill and Oneida after the Court's *Sherrill* decision.[4] Moreover, even before *Sherrill*

Equality, Inc. v. United States, No. 08-cv-633 (N.D.N.Y., filed June 16, 2008); *Central N. Y. Fair Business Ass'n v. Salazar*, No. 08-cv-660 (N.D.N.Y., filed June 21, 2008).

[3] The letters of credit were drafted prior to the trust litigation. The Oneida Nation must periodically renew the letters of credit to address taxes accruing while the trust decision is under judicial review; it has now amended the letters of credit to include the trust litigation as well.

[4] As to Sherrill, see Stipulation of Dismissal [D.E. 104], *Oneida Indian Nation v. City of Sherrill*, No. 00-cv-223 (N.D.N.Y., filed Oct. 18, 2005); CA App. A1633-37. As to the City of Oneida, see Caitlin Traynor, Oneida Nation Paid City $300,000 in 2009, Oneida Daily Dispatch (July 13, 2010) available at

held that its land was not federally immune from taxation, the Oneida Nation was paying millions of dollars in lieu of taxes to localities. CA App. A646-47 (Madison County); A788 (school districts); A1609 (localities within Oneida County); A1649-50 (general formula). In the case of Oneida County, for example, the amounts paid to government entities within the County (for which the County acts as collector) exceeded the total taxes (and penalties and interest) claimed for just such tax liabilities by the County (which, however, refused to recognize those payments and sought foreclosure for unpaid taxes anyway). *Id.* at A1971.

Unlike the Cities of Sherrill and Oneida, petitioners Madison County and Oneida County refused to negotiate with the Oneida Nation over payment of penalties and interest (*id.* at A631) and not only opposed but sought to preempt the trust process after *Sherrill*. On April 28, 2005, before Interior could act on the Oneida Nation's trust application, Madison County moved in state court to foreclose on the Oneida Nation's land. *Id.* at A373-83. To prevent a foreclosure that as a practical matter would preclude a trust transfer, the Oneida Nation requested and won a preliminary injunction against foreclosure in already-pending federal litigation against Madison County. Pet. App. 56a. When Oneida County moved to foreclose through an administrative process, the Oneida Nation filed a new action and obtained a preliminary injunction there too. *Id.* at 35a.

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http://oneidadispatch.com/articles/2010/07/13/news/doc4c3d217fa3b47747375376.txt (renewal of agreement).

Subsequently, in both cases, the district court granted summary judgment for the Oneida Nation and permanently enjoined foreclosure based on five determinations: (a) the Oneida Nation was immune from foreclosure; (b) the land at issue was subject to federal statutory restrictions against alienation; (c) the Counties had failed to give the required notice and violated the due process clause; (d) the land was within a reservation that had not been disestablished and was therefore tax exempt under *state* statutes; and (e) the Oneida Nation was not liable for penalties and interest and was not subject to foreclosure to collect them. *Id.* at 65a-76a (Madison County); 41a-46a (Oneida County). The Counties appealed to the Second Circuit.

d. The decision below. After requesting briefing from the United States, the Second Circuit affirmed the injunctions on the basis of tribal sovereign immunity without reaching the other grounds relied on by the district court.[5] The court of appeals carefully analyzed, and rejected, the Counties' claim that this Court's *Sherrill* decision disposed of tribal sovereign immunity against tax enforcement in holding that the Oneida Nation lacked sovereign authority over the land, authority that (where it exists) entails immunity from taxation. "We think that this argument improperly conflates two distinct doctrines: tribal sovereign authority over reservation lands and tribal sovereign immunity from suit." Pet. App. 14a; *see id.* at 16a. Reviewing

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[5] The United States supported the district court's ruling that the Oneida Nation's sovereign immunity barred the attempted foreclosure. U.S. *Amicus* Br. in Support of Appellee and Affirmance, No. 05-6408 (2d Cir.), 2008 WL 6086315, at *9-20.

the development of those two distinct doctrines, and the availability of sovereign immunity from suit even where underlying tax immunity is absent, as reaffirmed in both *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991), and *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998), the court concluded:

> In light of this history, we do not read *Sherrill* as implicitly abrogating the OIN's immunity from suit. No such statement of abrogation was made by the *Sherrill* Court, nor does the opinion call into question the *Kiowa* Court's approach, that any abrogation should be left to Congress. *Sherrill* dealt with "the right to demand compliance with state laws." *Kiowa*, 523 U.S. at 755. It did not address "the means available to enforce" those laws." *Id.*

Pet. App. 20a.

Having ruled that *Sherrill* did not carve out a special exception to tribal sovereign immunity from suit for the Oneidas, the court pointed to *Potowatomi* as rejecting the Counties' argument that immunity against tax enforcement was inconsistent with amenability to taxation. *Id.* at 21a-22a. Two judges concurred in an opinion objecting to the outcome on policy grounds but agreeing that it was compelled by "unambiguous guidance from the Supreme Court" on tribal sovereign immunity from suit even in the absence of immunity from underlying tax liabilities. *Id.* at 32a-33a.

That determination sufficed to affirm the injunctions, regardless of whether the land in

question was still reservation land. In a footnote, the panel said that it need not revisit whether the 1838 Treaty of Buffalo Creek disestablished the Oneida reservation—while noting that its earlier holding that the reservation was not disestablished, remains the law of the Circuit. Pet. App. 16a-17a & n.6. The Second Circuit also did not decide whether (as the district court ruled) the Oneida Nation was entitled to the *state*-law tax exemptions for reservation land in tribal possession. N.Y. Indian L. § 6; N.Y. Real Property Tax L. § 454.

REASONS FOR DENYING THE PETITION

I. THE RULING ON SOVEREIGN IMMUNITY FROM TAX FORECLOSURE PROCEEDINGS DOES NOT WARRANT REVIEW.

Petitioners and *amici* have shown no basis for review under established certiorari standards: no inconsistency with this Court's precedents, no lower court conflict, no real-world significance for practices elsewhere, not even a concrete nonspeculative harm to petitioners' interests regarding taxation of the particular land at issue. Those are reasons enough to deny review, but the unique context of this case also makes it particularly inappropriate for this Court's intervention to consider a new judicially imposed limitation on tribal sovereign immunity.

The present case arose in the special transition circumstances that followed this Court's decision in *Sherrill*. That decision reversed the lower courts' recognition of the Oneida Nation's sovereign authority over the land at issue and its concomitant immunity from state taxation, thus newly settling

that question to deny such underlying immunity. *Sherrill* also set in motion the congressionally established federal agency process for taking the land into trust, identifying it as the "proper avenue" for resolving sovereignty questions. Petitioners immediately sought to preempt that process by moving to foreclose on the land, and refused to discuss an agreement even on penalties involving the period during which the governing federal court decisions explicitly affirmed the Oneida Nation's tax immunity or credit for the Oneida Nation's payments in lieu of taxes.

These circumstances furnish no ground for speculating that the usual immunity-respecting governmental negotiations will fail once underlying governance and taxation authority is settled. They also show the falsity of the picture the petition paints of the Oneida Nation as defying this Court's *Sherrill* decision. As soon as this Court made clear that the Oneida Nation's land had no federal immunity from state taxation, the Oneida Nation promptly negotiated agreements to discharge past and future tax obligations with the local taxing jurisdictions (unlike petitioners) that were willing to do so. Although the Towns of Vernon and Verona, in their *amicus* brief, point to various disputes about local land use (at 9-10), those disputes all occurred *before* this Court resolved the sovereign-authority issue in *Sherrill*. It was not Oneida Nation post-*Sherrill* obstructionism, but petitioners' efforts to short-circuit the *Sherrill*-recommended agency trust process concerning land, all within the Oneida Nation's treaty reservation, that led to this foreclosure-immunity dispute.

As to regulatory issues not presented here, in the trust process, Interior thoroughly examined the Oneida Nation's past practices and disputes, even from before this Court's decision in *Sherrill*, and it concluded that the combination of Oneida Nation standards, government-to-government agreements, and federal oversight will ensure that local concerns are met. Record of Decision § 7.6, at 60-68; *see id.* at 46-47, 51-52, 57-58. And, as to tax payments on the land specifically at issue, the trust process has already guaranteed that there is no sovereign-immunity obstacle to the Counties' ability to receive past taxes, penalties, and interest properly due, through letters of credit described above. The circumstances of this case thus provide no warrant to consider a judicial curtailment of recognized tribal sovereign immunity that Congress has seen no reason to limit.

A. The Second Circuit Correctly Followed This Court's Decisions.

This Court has expressly recognized the fundamental distinction between a sovereign's authority to govern land (with certain implications of *substantive* immunity from other sovereigns' governance authority over that land, including their taxing authority) and a sovereign's immunity from enforcement proceedings. Unambiguous precedent establishes that the latter, which Congress has not limited for Tribes, applies here, as the Second Circuit unanimously held. *See* Pet. App. 33a (Cabranes, J., concurring) (finding "unambiguous guidance" from this Court's precedents).

1. ***Potowatomi & Kiowa.*** In *Potowatomi*, this Court considered *both* a question of substantive

tax immunity *and* a question of sovereign immunity from enforcement, answering the former in favor of the State and the latter in favor of the Tribe. As to the former, the Court held that tribal sovereignty over its reservation did not prevent Oklahoma from requiring the Tribe to collect and remit taxes on cigarette sales to non-Indians. 498 U.S. at 512-13. Nevertheless, the Tribe's sovereign immunity from suit barred the State's action to enforce that obligation. *Id.* at 514.

Specifically rejecting the State's request to carve out tax enforcement from tribal sovereign immunity against suit, the Court recognized that "[a]lthough Congress has occasionally authorized limited classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments. Instead, Congress has consistently reiterated its approval of the immunity doctrine." *Id.* at 510. Like the Counties here (Pet. 9), Oklahoma argued that the rulings were self-contradictory and nullified the Tribe's tax obligation, but the Court disagreed. It explained that the tax obligation was not actually nullified and that it was up to Congress to address any problems with respecting traditional enforcement immunity:

> In view of our conclusion with respect to sovereign immunity of the Tribe from suit by the State, Oklahoma complains that, in effect, decisions such as [*Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1975)] and [*Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980)] give them a right without any remedy. There is no doubt that sovereign

> immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. *See Ex parte Young*, 209 U.S. 123 (1908). And under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, *Colville, supra*, at 161-162, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, *City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122 (CA10 1990). States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax. *See* 48 Stat. 987, as amended, 25 U.S.C. 476. And if Oklahoma and other States similarly situated find that none of these alternatives produce the revenues to which they are entitled, they may of course seek appropriate legislation from Congress.

498 U.S. at 514.[6]

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[6] *Amicus* Town of Lenox points to the *Potowatomi* Court's reference to "seizing unstamped cigarettes off the reservation" as a permissible means of enforcement. Lenox Br. 18-19 & n.14. That cannot justify the land foreclosures here. The Court was discussing such a measure against "wholesalers," not the Tribe. Moreover, the cited authority, *Colville*, 447 U.S. at 161-62, was addressing unlawfully possessed, in-transit, off-reservation "contraband." The seizure of contraband such as unstamped

In *Kiowa*, the Court once again rejected a request that it limit a Tribe's sovereign immunity from suit to proceedings involving "transactions on reservations and governmental activities." 523 U.S. at 755. The petitioner argued that the scope of tribal sovereign immunity from suit should coincide with tribal governance. The Court explained that sovereign immunity from *suit*—the doctrine at issue in *Kiowa*—was different from the substantive immunity from state *law* that attends a Tribe's governance authority over certain land, persons, or activities:

> Our cases allowing States to apply their substantive laws to tribal activities are not to the contrary. We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973); *see also Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962). To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In *Potawatomi*, for example, we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes. 498 U.S., at 510. There is a difference between the right to demand compliance with state laws

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cigarettes is different from proceedings to foreclose on lawfully possessed tribal land.

> and the means available to enforce them. *See id.*, at 514.

Id. at 755. And the Court reiterated that it was up to Congress to weigh the policy interests, including whether or not there was any practical need to limit the historic sovereign immunity of this Continent's first sovereigns. *Id.* at 758 ("we defer to the role Congress may wish to exercise in this important judgment").

This Court has thus repeatedly considered and rejected the very arguments petitioners make for judicial abrogation of a traditional sovereign immunity from tax enforcement even where there is no immunity from underlying state obligations.

2. **There Is No Sovereign Immunity Exception for Tax Foreclosures.** Contrary to the submission of petitioners and *amici*, there is no general "in rem" exception stripping away sovereign immunity in enforcement actions (as here) involving property in a sovereign's possession. To hold otherwise for Tribes would be inconsistent with, and undermine, the background principle of federal sovereign immunity that protects other sovereigns (unless changed by Congress or, in the foreign-sovereign context, the President).

For States, Eleventh Amendment immunity protects against *in rem* libel actions in federal admiralty against ships in the State's possession (*see California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) (discussing cases, distinguishing case of ship not in State's possession)) and also protects against quiet title actions (*see Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281-82 (1997)). For foreign

Nations, the traditional immunity protected their ships, whether warships or commercial ships, from *in rem* libel actions. *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812); *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562 (1926) (ship owned and possessed by a foreign government and operated commercially immune to in rem libel action); *see also Long v. The Tampico*, 16 F. 491 (S.D.N.Y. 1883); *F.W. Stone Eng'g v. Petroleos Mexicanos de Mexico, D.F.*, 352 Pa. 12 (1945) (bank account of foreign instrumentality). For the federal government, it is long settled that state foreclosures on federal property for non-payment of taxes are barred by sovereign immunity even when Congress has lifted tax immunity.[7] Likewise as to foreign sovereigns: the background rule (subject to congressional or presidential limitation) is immunity from foreclosure, even when the property is taxable.[8]

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[7] *United States v. Lewis County*, 175 F.3d 671, 674 (9th Cir. 1998); *United States v. County of Richland*, 500 F. Supp. 312, 315-16 (D.S.C. 1980); *United States v. Davidson*, 139 F.2d 908, 911 (5th Cir. 1943); *United States v. Alabama*, 313 U.S. 274, 281-82 (1941); *BF Partners, LLC v. Estate of McSorley*, 2005 WL 1335150, at *7 n.4 (W.D. Mich. June 6, 2005) (GNMA not subject to tax foreclosure); *Detroit Leasing Co. v. Yepez*, 2005 U.S. Dist. LEXIS 20422, at *8 (E.D. Mich. 2005); *cf. Sec'y HUD v. Sky Meadow Ass'n*, 117 F. Supp. 2d 970 (C.D. Cal. 2000) (foreclosure by homeowner's association); *United States v. City of Newark*, 2009 WL 3230892 (D.N.J. Sept. 29, 2009) (foreclosure for unpaid water and sewer fees).

[8] Restatement (Second) of Foreign Relations Law of the United States, § 65, Comment d (1965); *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 36 (3d Cir. 1985); *In the Matter of Foreclosure of Tax Liens*, 255 N.Y.S.2d 178 (Westchester Cty. Ct. 1964) (immunity to foreclosure of tax lien on residences for diplomats); *cf.*

Seeking to show otherwise for *foreign* sovereigns, *amicus* Town of Lenox (though not petitioners or the State *amici*) latches onto and misreads this Court's decision in *Permanent Mission of Indian v. City of New York*, 551 U.S. 193 (2007), as if it ruled that a longstanding "immovable property" exception to foreign sovereign immunity allowed a country to foreclose on another country's (non-consular) real property located in the former's territory. Lenox Br. 5 (alleging "blackletter federal common law for nearly 200 years"). That contention is wrong, about both *Permanent Mission* (which did not involve or rule on foreclosure or any form of execution) and the historical "immovable property" exception (for which Lenox cites not a single case showing its invocation to support a tax foreclosure against real property). The "immovable property" exception and foreclosure have always been separate subjects, and Lenox is fundamentally wrong in conflating them.

At common law, a foreign nation had sovereign immunity against enforcement actions involving its property. *See Kiowa*, 523 U.S. at 759 ("While the holding was narrow, '[*The Schooner Exchange*] came to be regarded as extending virtually absolute immunity to foreign sovereigns.'") (citation omitted). *The Schooner Exchange* confirmed the broad sovereign immunity from the execution of process against a foreign nation's property (in that case a ship), while noting that a "person who happens to be a prince" (11 U.S. at 145) might lack sovereign

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Knocklong Corp. v. Kingdom of Afghanistan, 167 N.Y.S.2d 285 (Nassau Cty. Ct. 1957) (dismissing suit by private party to enforce tax deed on property acquired for diplomatic residence).

immunity against actions involving property he owns as an individual (*see id.* at 144 (same distinction)).[9] Lenox identifies no authority establishing a recognized realty exception to the absolute immunity of foreign sovereigns to execution, whether for tax collection or private suits. As late as 1965, the Restatement (Second) of Foreign Relations Law, after noting the fundamental distinction between a state's "prescriptive" jurisdiction to tax or regulate and its immunity from enforcement, stated without exception that "*no case has been found in which the property of a foreign government has been subject to foreclosure of a tax lien or a tax sale*" and that "[t]he [immunity] rule stated in this Section prevents the actual enforcement against the property of a foreign state of a tax claim of the territorial state." § 65, cmt. d (emphasis added).

The "immovable property" exception to immunity allowed local courts to decide "all disputes over use or right to use real property within its own domain" (*Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984)), it did not curtail, or even address, sovereign immunity from foreclosure or other execution. Even the 1965 Restatement (updating traditional immunity law), in stating an "immovable property" exception to the general Section 65 immunity rule (*see* § 68(b) & cmt. d), expressly stated that the

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[9] *See French Republic v. Bd. of Supervisors*, 200 Ky. 18, 21-22 (1923) (exempting French government-owned tobacco from taxation in part because sovereign immunity precludes collection); 5 Op. Atty. Gen. Mass. 445 (1920) (same as to property stored by foreign governments within the state); Wm. W. Bishop, Jr., Immunity From Taxation of Foreign State-Owned Property, 46 Am. J. Int'l L. 239, 255 (1952).

immunity rule of Section 65 governed for tax enforcement—it "prevents [tax] enforcement" (§ 65, cmt. d))—confirming that the Section 68 exception was not an exception for tax foreclosures. Similarly, when Congress in 1976 enacted the Foreign Sovereign Immunity Act (FSIA), it treated the "immovable property" exception (28 U.S.C. § 1605(a)(4)) separately from matters of execution such as foreclosure (28 U.S.C. §§ 1609-1611). These have always been distinct matters. In *Permanent Mission* itself, this Court held that the FSIA "immovable property" exception allowed a declaratory judgment action to establish the validity of a tax lien, but it did not address foreclosure, except to note the City's concession that it could *not* foreclose even once the lien was confirmed. 551 U.S. at 197 n.1 (despite inability to foreclose, confirmation of tax lien mattered because of effect on future sale, voluntary compliance, and federal government pressure).

Even in the foreign-nation setting, therefore, the background rule provided for sovereign immunity against foreclosure. Of course, in the FSIA, Congress limited that background rule for foreign sovereigns in certain respects, in the execution sections of the statute, after weighing the various policy interests involved. *Permanent Mission*, 551 U.S. at 199 (FSIA adopted restrictive theory). But Congress has not changed the rule for Tribes, and it is up to Congress to decide whether to eliminate immunity against foreclosure. *Kiowa*, 523 U.S. at 758. Leaving that judgment to Congress is particularly important for tribal *land*—here, land within the Tribe's aboriginal territory and treaty reservation—which Congress has long accorded distinctive protection, including the processes for creation of trust status involved here.

See, e.g., 25 U.S.C. § 177 (restrictions against alienation); 25 U.S.C. §§ 462, 463 (restoring tribal land rights and extending restrictions).

The Town of Lenox (like the Counties below, but not in this Court) also relies on *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924), and its determination that railroad property acquired by Georgia in Tennessee was subject to Tennessee's power of eminent domain. But *City of Chattanooga* does not conflict with the Second Circuit's decision, for at least two reasons. First, and decisively, a State's recognition of any immunity of other States from suit in its own courts is a matter of state law, not of federal law. *Nevada v. Hall*, 440 U.S. 410 (1979). This Court already has indicated that *City of Chattanooga* merely exemplifies the *Hall* principle, which allows a State to make its own policy judgments about its own recognition of immunity of other States in its courts. *Id.* at 426 n.29. For tribal sovereign immunity, a matter of federal law, such judgments are up to Congress. Second, *City of Chattanooga* did not involve a tax foreclosure but an exercise of eminent domain, which presents different issues.[10]

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[10] Eminent domain is not a form of enforcement; it involves a sovereign's need to use a particular piece of property within its territory, not an interest in mere proceeds to satisfy some obligation that could be satisfied by other means; it must protect the property owner's financial interests through just compensation; and the property owner cannot halt the proceeding by satisfying an underlying obligation. "Liens, whether equitable or legal, are merely a means of satisfying a claim for the recovery of money." *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 262 (1999) (equitable lien does not avoid federal sovereign immunity). A foreclosure case is not an

Thus, in every relevant context, the federal background rule of sovereign immunity, unless altered by Congress, contains no enforcement exception allowing tax foreclosures.

B. *Sherrill* Did Not Involve, or Alter the Law on, Sovereign Immunity from Suit.

Contrary to the primary submission of the petition, the Second Circuit's ruling is perfectly consistent with this Court's *Sherrill* decision. The issues presented to and decided by this Court were entirely about governance (including taxation) authority over particular land. There was no issue of immunity from suit, and the Court did not silently alter the longstanding separate doctrine of tribal sovereign immunity from suit. The petition, in relying on *Sherrill*, ignores the well-established distinction between the two topics.

The Oneida Nation in *Sherrill* had argued that, when it reacquired reservation land that had been alienated from its possession contrary to federal law, the land reverted to sovereign Indian land with concomitant immunity from state property taxation. When the Second Circuit agreed, the petition presented four questions for review, all concerning governance authority over that land. 03-855 Pet. *i.* This Court rejected that theory and held, as the Oneida Nation acknowledged in the Second Circuit below, "that equity has stripped away the Oneidas' federal tax immunity and sovereignty over reacquired lands." Oneida Nation CA Br. 1. The

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appropriate vehicle for addressing distinctive aspects of eminent domain.

ruling, resting on "equitable considerations" (544 U.S. at 214), was entirely about governance authority over land, as the Court's repeated statements of the issue and its holding confirm. 544 U.S. at 221 (history "render[ed] inequitable the piecemeal shift in *governance* this suit seeks unilaterally to initiate"), 202 ("governance"; "regulatory authority"), 202-03 ("We hold that the Tribe cannot unilaterally revive its ancient *sovereignty*, in whole or in part, *over the parcels at issue.*"), 212 ("the imposition of property taxes"; "tax exempt"), 213 ("*sovereign dominion over the parcels*"), 214 ("sovereign immunity *from local taxation on parcels of land*"; "governance"), 215 ("*sovereignty over land*"), 215-16 ("regulatory jurisdiction"), 218 ("*dominion and sovereignty over territory*"; "*sovereign control over territory*"), 219 ("*sovereign control over land*"), 220 ("sovereign control" by Tribe would "free the parcels from local zoning or other regulatory controls"), 220-21 ("*sovereign control over territory*"), 221 ("*sovereign authority over territory*"; "piecemeal *shift in governance*"). (All emphases added).

There was no issue of sovereign immunity *from suit* (enforcement), which is not territory-dependent but only party-status-based, in this Court in *Sherrill*. Although the lower courts addressed one issue of sovereign immunity from suit, that issue was not presented to or addressed by this Court.[11] When

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[11] The City of Sherrill had sued tribal officials for, *inter alia*, failing to remit sales taxes. The Second Circuit held that claim to be "no different from a claim against the tribe itself for non-payment of sales taxes," and concluded: "since the District Court correctly concluded that these officers were immune from suit on the claims related to collection of sales taxes, we affirm the dismissal of" the claim against the officials. 337 F.3d at

this Court, in footnote 7, stated that "tax immunity" was not a defense to eviction, it was not discussing sovereign immunity from suit, but the unavailability of immunity from the underlying taxation, whether asserted affirmatively or defensively. 544 U.S. at 214 n.7 (responding to 544 U.S. at 225-26 (Stevens, J., dissenting)). *See* CA App. 864 (State's concession). And when the Court used the phrase "sovereign immunity," it did not use the phrase alone, but as part of "sovereign immunity *from local taxation*" (544 U.S. at 214 (emphasis added)), again referring to the underlying legal obligation, not the distinct immunity from suit.

The Second Circuit thus correctly understood that *Sherrill* addressed a different issue from the issue here and left the doctrine of tribal sovereign immunity from suit untouched. [12]

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169. The City did not petition from, and this Court nowhere discussed, that ruling. (New York had followed and continues to follow a policy of sales tax forbearance for tribes. *See N.Y. Ass'n of Convenience Stores v. Urbach*, 712 N.Y.S.2d 220 (N.Y. App. 2000), *lv. to appeal den.*, 96 N.Y. 2d 717 (2001)).

[12] In *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 273 (2d Cir. 2005), the Second Circuit, speaking through Judge Cabranes (who concurred here), relied on *Sherrill* to bar a tribal suit for rental damages. More recently, the Second Circuit construed *Sherrill* (and *Cayuga*) to require dismissal of the Oneida Nation's and United States' claims for disgorgement of the State's profits from the purchase of Oneida land in violation of federal law. *Oneida Indian Nation v. New York*, ___F.3d___, 2010 WL 3078266 (2d Cir. Aug. 9, 2010).

C. *Yakima* Did Not Involve, or Alter the Law on, Sovereign Immunity from Suit.

Petitioners and *amici* are incorrect in claiming that the Court decided that tribal sovereign immunity allows tax foreclosures of tribally owned land in *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992). Pet. 10. Quite simply, there was no tribal sovereign immunity issue presented in that case and no issue of foreclosure of tribally owned land. Rather, as the Court made explicit, the case presented and the Court decided only questions of state taxing authority, not tax enforcement. *Id.* at 253 ("The question presented by these consolidated cases is whether the County of Yakima may impose an ad valorem tax on so-called 'fee-patented' land located within the Yakima Indian Reservation, and an excise tax on sales of such land."); *id.* at 270 ("We hold that the General Allotment Act permits Yakima County to impose an ad valorem tax on reservation land patented in fee pursuant to the Act"); *see also id.* at 270 (Blackmun, J., dissenting in part) ("I dissent from [the Court's] conclusion that the county may impose ad valorem taxes on Indian-owned fee-patented lands.").

The parties presented contentions only about the State's imposition of legal obligations (tax liability). They did not ask for a ruling on any foreclosure against Tribe-owned property. That was no accident: the case was prompted by foreclosure proceedings against *members* (who could not claim sovereign immunity from suit); and the Tribe presented only arguments that applied equally to its

property and that of its members.[13] *Yakima* thus did not alter the uniform background law of tribal sovereign immunity that bars foreclosure.

D. There Is No Basis for Revisiting the Issue to Consider Judicially Imposing a New Limit on Immunity.

Petitioners and *amici* demonstrate no lower-court conflict or other reason for this Court to revisit tribal sovereign immunity from suit, with its established application to foreclosure actions. Any revision of immunity should be left to Congress, which can readily balance competing interests. There is no justification for this Court's intervention, certainly not at this time.

1. There Is No Lower Court Conflict Or Real-World Problem. Neither petitioners nor *amici* identify a single other federal-law case involving or approving a tax foreclosure against a Tribe—to which the relevant question presented is

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[13] The petitions in *Yakima* presented questions about state tax authority on tribal land, none involving tax foreclosure or other enforcement. Pet. Br., 1991 WL 521727, at **i*; Resp. Br., 1991 WL 521292, at **i*. The parties nowhere sought a ruling on enforcement immunity. The United States has explained that, in *Yakima*, "[t]he Tribe did not urge any distinction in the analysis to be applied to the two categories of land," Tribe-owned and member-owned, partly because the underlying foreclosures triggering the federal case were against members. *See* U.S. Amicus Br., *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 1998 WL 25517, at 11 n.2 . *See* Tr. of Oral Argument in *Yakima*, 1991 WL 636297, at *27 ("This action was instituted by the Yakima Nation in response to the foreclosure and the pending tax sales of the lands and homes of 31 members of the tribe."); U.S. Amicus Br. in *Yakima*, 1991 WL 11009207, at *2 (same); Resp. Br., 1991 WL 521292, at *9 (same).

limited (Pet. *i*). That means, first, that there is no decisional conflict warranting this Court's attention and, second, that there is no real-world problem involving tribal sovereign immunity and tax foreclosures.

No other federal court of appeals has disagreed with the Second Circuit or even addressed the issue here. The petition nowhere alleges an intercircuit conflict. It cites only two federal-court decisions, both by district courts (one from the Second Circuit). Neither involved sovereign immunity from foreclosure to enforce a tax obligation.

New York v. Shinnecock Indian Nation, 523 F. Supp. 2d 185 (E.D.N.Y. 2007), is far afield. It did not involve an "in rem" proceeding at all, or taxation or foreclosure. It involved suits, against a Tribe and its officials, seeking personal injunctions to enforce certain land use regulations involving a construction project. The district court's clearly overbroad statement about *Sherrill* (*id.* at 298) was triply unnecessary to the decision where the Tribe was (and is) not yet federally recognized, and where the court held that the Tribe had waived any sovereign immunity from suit (*id.* at 297-98) and that the Tribe's presence was immaterial because sovereign immunity was no barrier to prospectively enjoining the co-defendant tribal *officials* (*id.* at 298-99). That misreading has been corrected by the Second Circuit's decision below, and would not, in any event, justify review of the quite different foreclosure issue here. Unlike *Shinnecock*, this case presents no regulatory enforcement issue.

The other district court decision cited by petitioners (in a footnote, Pet. 18 n.11), *Oneida Tribe*

of Indians of Wisconsin v. Village of Hobart, 542 F. Supp. 2d 908 (E.D. Wis. 2008), involved neither foreclosure nor, indeed, tribal sovereign immunity. Rather, it involved condemnation of land for a road, and the Tribe did not raise a sovereign immunity defense at all, relying instead on federal restrictions against alienation. The district court concluded that Congress had authorized state condemnation of land that had previously been allotted. *See* 25 U.S.C. § 357. Its discussion of tax foreclosure and sovereign immunity is pure *dicta*.

Amici Town of Lenox (at 16) and Towns of Verona and Vernon (at 17-18) cite two decisions of state supreme courts. Neither involved tax foreclosure. Both also involved eleventh-hour transfers of land owned by non-Indians to a Tribe for the specific purpose of trying to thwart certain adjudications by means of tribal sovereign immunity.

Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 929 P.2d 379 (Wash. 1996), involved a pending quiet-title and partition action. In allowing it to proceed, the court noted not only that the interests at issue had been transferred to the Tribe after the suit commenced (*id.* at 381) but that the Tribe "would lose no property or interest for which it holds legal title" in the case (*id.* at 385). And *Cass County Joint Water Res. Dist. v. 1.43 Acres of Land*, 643 N.W.2d 685 (N.D. 2002), involved an eminent domain proceeding. The court stressed that the Tribe had acquired its interest on the eve of the long-planned action and was not even a necessary party to a proceeding that, after all, the Tribe could not stop by satisfying any underlying liability (which was not at issue). *Id.* at 688-90. Despite some broad

language in both opinions, both cases are plainly different from the present case.

Petitioners and *amici*, including the States (Pet. 15-18; State Br. 13), cannot point to any lower court conflict on the tax foreclosure issue presented. They therefore must resort to positing a hypothetical problem of widespread tribal acquisition of non-reservation land, refusal to pay property taxes, and invocation of sovereign immunity from suit. But that suggestion—even apart from its inapplicability to the land at issue here, all within the Tribe's aboriginal territory and treaty reservation—is entirely hypothetical.

There is no real-world problem of this sort. There are good reasons that no such problem exists or is likely to develop, including the practical need for good-neighbor relations, the strong role of the federal government in overseeing tribal actions (here including its trust authority), and the ever-present possibility of congressional action if tribal actions threatened substantial state and local interests. Those are reasons not to expect the posited hypothetical to materialize now any more than it did after *Potowatomi* or *Kiowa*. In any event, the plain fact is that no such problem exists now to warrant intervention.

2. Any New Limitations On Immunity From Suit Should Be Left To Congress. *Kiowa* and *Potowatomi* reaffirmed tribal sovereign immunity, which, as shown above, includes immunity against tax enforcement. The petition nowhere directly asks this Court to overrule precedent, saying only that *Kiowa* and *Potowatomi* are "inapposite" (Pet. 13, 15) and vaguely urging the Court to "revisit"

tribal sovereign immunity generally (Pet. 15-19). Absent a direct request to overrule existing precedent, the Court generally declines to do so.

In any event, whether viewed as a request for overruling or as a request for a dramatic new judicial limitation, petitioners' arguments cannot justify reversal of the Second Circuit's recognition of immunity here. Both as a matter of *stare decisis* and independently of that doctrine, there are especially strong reasons to respect the immunity principle until Congress decides to limit it.

Stare decisis is particularly strong where Congress can act but has not. *See Watson v. United States*, 552 U.S. 74, 83 (2007) (congressional inaction for 14 years increases the precedential force of earlier decision); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 32 (2005). More particularly, this Court in both *Kiowa* and *Potowatomi* noted that revision of tribal sovereign immunity is for Congress—a principle of deference having particularly strong application when the congressionally established trust process and historical tribal land are at stake. Congress is fully aware of tribal sovereign immunity. But, even while acting in the area, Congress has not curtailed that immunity since *Kiowa* or *Potowatomi*, and there is no reason to think the political process in any way inadequate or unresponsive to concrete state concerns.[14] *Cf.* S. Rep. 100-446, at 3-4 (1988)

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[14] In the 105th Congress, shortly after *Kiowa*, Senator Gorton introduced the American Indian Contract Enforcement Act (S.2299) and the American Indian Tort Liability Insurance Act (S.2302). Referring to the Court's decision, the bills would have substantially limited tribal sovereign immunity, but they were not reported out of committee. In 2000, after hearings,

(congressional response to *Cabazon* decision on tribal gaming).

In both *Kiowa* (523 U.S. at 758), and *Potowatomi* (498 U.S. at 510), the Court rejected arguments to restrict tribal sovereign immunity based on the expansion of tribal business activity on and off reservations, much like the Counties' argument here. Pet. 15-17. Instead, the Court in both cases deferred to Congress to make the policy judgment about the interests of non-Indian governments and the important sovereign character of Tribes. Any curtailment of the latter would affect more than 500 federally recognized Tribes. It would therefore require, at the very least, significant real-world harm to the former. Only Congress can make that judgment, and the plain fact is that the predictions of extreme abuses in *Potowatomi* and *Kiowa* have proved false—as the absence of congressional action in the years since *Potowatomi* and *Kiowa* confirms.

As to this case particularly, the specific circumstances and consequences undermine, rather than bolster, the argument for review. In addition, the district court relied on several alternative grounds to enjoin foreclosure in this case. Pet. App. 23a (state tax exemptions, due process, and federal restrictions against alienation of tribal land); Pet.

Congress enacted the Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. 106-179, 114 Stat. 46, which required only disclosure or waiver of sovereign immunity in certain contracts requiring federal approval. In the 108th Congress, S.521 would have required certain disclosures related to tribal sovereign immunity in leases, but it was amended to eliminate that requirement and never enacted.

App. 65a-68a (restrictions); 72a-73a (due process); 73a-74a (state tax exemptions). The Second Circuit did not reach those grounds. The strength of those alternative grounds to reach the same result, while not precluding review on the ground adopted by the Second Circuit, further weakens any argument for review of this particular case.

II. THE DISESTABLISHMENT QUESTION WAS NOT DECIDED BELOW AND DOES NOT WARRANT REVIEW.

The question whether the 1838 Treaty of Buffalo Creek, 7 Stat. 550 (Jan. 15, 1838), *amended* 7 Stat. 586 (May 20, 1842), disestablished the Oneida reservation is not worthy of this Court's review, either independently or in conjunction with the sovereign immunity issue. The Second Circuit below did not decide it. Resolution of that fact-intensive question affects only the Oneida Nation, because the controlling treaty language and negotiating history are specific to the Oneidas. The disestablishment question was fully briefed in *Sherrill*, but the Court declined to decide it. 544 U.S. at 215 n.9. There is no reason to do so in this case.

The petition argues for review based on the potential effect of the decision in other cases (Pet. 22), but if the question matters in those cases, it can be decided if properly raised there (rather than in this case, where the Second Circuit found it unnecessary to decide the question and the Counties raised it only in passing (Counties CA Br. 99-103; Counties CA Reply Br. 34)). Moreover, the only such case the petition identifies is *Cayuga Indian Nation v. Gould*, 14 N.Y.3d 614 (2010), which could not

justify review here—even aside from the fact that the State has promulgated new regulations to supersede the law at issue in *Gould*. 14 N.Y.3d at 629 n.6 (noting proposed regulations). *Gould* involves a different Tribe (the Cayugas) with rights governed by different treaty language and a different treaty history—as illustrated by the fact that the *amicus* brief filed by Cayuga and Seneca Counties in the present matter dwells on Cayuga history (such as an arbitral award having nothing to do with the Oneida Nation) without even analyzing the distinct Oneida history. Cayuga Br. 10.[15]

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[15] In *Gould*, the court held that land that the Cayugas had reacquired within their federal reservation boundary was a "qualified reservation" entitled to special treatment under state tax law, notwithstanding the conceded absence of any tribal sovereignty over the land, because the Cayuga reservation was still federally recognized. 14 N.Y.3d at 635-45. The court cited the Second Circuit's opinion below (noting the earlier ruling that the Oneida reservation was still recognized) merely as confirming that loss of tribal sovereign authority because of *Sherrill* does not eliminate federal recognition of the reservation. *Id.* at 642. The three dissenters in *Gould* did not question the reservation-status conclusion. *Id.* at 654-55. The court explicitly reserved the state-law question of reservation status for purposes of the state property-tax exemption. *Id.* at 646.

The petition for certiorari, *Gould v. Cayuga Indian Nation*, No. 10-206 (filed Aug. 9, 2010), insofar as it discusses federal treaties, makes arguments specific to the Cayugas. The argument that the Cayuga reservation lacked federal treaty protection is inapplicable to the Oneida Nation, whose land had been indisputably protected (before the first land sale at issue) by a separate federal treaty provision not applicable to the Cayugas. *See* Treaty with the Six Nations (Ft. Stanwix), 7 Stat. 15 (Oct. 22, 1784) ("The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are

The Second Circuit observed that its holding in the *Sherrill* case that the Oneida reservation was *not* disestablished—a conclusion this Court expressly left undisturbed in *Sherrill* (544 U.S. at 215 n.9)—"remains the controlling law of this circuit" (Pet. App. 16a-17a n.6). That observation does not warrant review. It is indisputably true, and it does not alter the fact that the court did not rely on any conclusion about disestablishment in its judgment here. The judgment in this case rests solely on the court's resolution of the tribal sovereign immunity issue, regardless of reservation status. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 n.7 (1982) (declining to reach claims of discrimination addressed in court of appeals' opinion but not involved in the judgment); *FCC v. Pacifica Foundation*, 438 U.S. 726, 734 (1978) (declining to reach constitutionality of speech addressed by FCC ruling but outside the factual context of the case).

The Second Circuit was also correct in its *Sherrill* opinion that the reservation was not disestablished. 337 F.3d at 158-65. The petition principally argues (Pet. 20, 22-23) for a kind of equitable disestablishment, but this Court already rejected such a notion in *Sherrill*, reaffirming that only Congress can disestablish a reservation. 544 U.S. at 215 n.9. The full merits briefing in *Sherrill* by the Oneida Nation (03-855 Resp. Br. 29-42) and the United States (03-855 U.S. Amicus Br. 16-24) showed that the Treaty of Buffalo Creek did not

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settled."). The argument that the Treaty of Buffalo Creek disestablished the Cayuga reservation depends on specific treaty language and negotiating history different from the Oneidas'.

disestablish the Oneida reservation because the treaty did not address the land illegally alienated before the treaty and because the federal commissioner assured the Oneidas that they were not required to move or to sell the land they still possessed. *See Minnesota v. Mille Lacs Band*, 526 U.S. 172 (1999) (treaty does not cede tribal rights not referred to); *City of Sherrill v. Oneida Indian Nation*, 337 F.3d at 161-62 (federal treaty commissioner assured the Oneidas they need not sell land or move).[16]

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[16] Petitioners' unsupported assertion that the Oneida reservation had "no physical existence in New York for approximately 200 years" (Pet. 22) is false. Judicial rulings and governmental determinations are to the contrary. *See* F. Hugo, Manual for Use of the Legislature of the State of New York 270 (1918) (listing Oneida reservation among "Indian reservations in New York" in 1855, 1865, 1875, 1892, 1910, and 1915); *United States v. Boylan*, 265 F. 165 (2d Cir. 1920) (upholding finding of continuous tribal possession); Compilation of Material Relating to the Indians of the United States, H.R. Rep. No. 81-30, at 80 (1950) (listing Oneida reservation in New York); *Waterman v. Mayor*, 280 N.Y.S.2d 927, 930 (Sup. Ct. 1967) ("the Oneida Indian Reservation does now exist"). Maps prepared for the Commissioner of Indian Affairs between 1883 and 1917 and lodged with the Court in *Sherrill* show the Oneida reservation in New York.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

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IN THE

Supreme Court of the United States

MADISON COUNTY and
ONEIDA COUNTY, NEW YORK,

Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK,

Respondent,

STOCKBRIDGE-MUNSEE COMMUNITY,
BAND OF MOHICAN INDIANS,

Putative Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT IN REPLY

Although a majority of the panel below concluded that its decision "defies common sense" and "calls out" for plenary consideration by this Court, Pet. App. at 32a-33a, the Oneida Indian Nation of New York ("OIN") seeks to minimize the gravity of its refusal to comply with *Sherrill*'s mandate, trivialize the "real-world significance" of its refusal to pay the *Sherrill*-mandated taxes, and malign Petitioners for simply seeking to enforce their sovereign rights upheld in *Sherrill*. According to OIN, Petitioners' only recourse for OIN's continuing refusal to pay its taxes is to appeal to "the practical need for good-neighbor relations, the strong role of the federal government in overseeing tribal actions (here including its trust authority), and the ever-present possibility of congressional action if tribal actions threatened substantial state and local interests." Opp. at 28. These avenues have been ineffectual in obtaining OIN's compliance with its tax obligations for the past 15 to 20 years. Requiring reliance on these measures invites tribal nullification of lawful tax obligations and federal court judgments, and is plainly not what this Court intended in holding that sovereign immunity may not be used defensively in a tax-foreclosure proceeding. *See City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 213-14 & n.7 (2005); *id.* at 222 (Souter, J., concurring). This is not a matter of "special transition circumstances" in following *Sherrill*'s mandate (Opp. at 9), but a simple refusal to comply with that mandate.

OIN ignores the procedural posture of *Sherrill* and misreads footnote 7 in which this Court rejected OIN's

claimed immunity from taxation and tax enforcement. OIN also misstates the holding of *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) in which this Court held that a state taxing authority had the power to collect ad valorem property taxes through *in rem* proceedings where those taxes were lawfully imposed on tribally-owned lands held in fee simple. *Yakima* also belies OIN's characterization of this case as "unique." Opp. at 2. And OIN's repeated mantra that the Counties are attempting to "preempt" the trust process by their resort to foreclosure (*id.* at 1, 2, 10) is simply false. In the face of OIN's persistent refusal to pay property taxes, the Counties' only remedy was foreclosure.

OIN seeks to portray this case "as a request for a dramatic new judicial limitation" on *tribal* sovereign immunity. Opp. at 29. Just the opposite is true. It is OIN that is seeking a "dramatically" *expanded* scope of tribal sovereign immunity with respect to real property located in *another* sovereign's jurisdiction — a kind of "super-sovereign" immunity not enjoyed by foreign nations or States in similar circumstances. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995). Historic and current rules of foreign and state sovereign immunity undermine, rather than support, OIN's refusal to pay property taxes while demanding all customary local services. The decision below is in direct and irreconcilable conflict with numerous state and federal decisions, whose detailed reasoning is not "broad language" and "pure *dicta*" (Opp. at 27-28), but the central rule of decision: there is *no* tribal exception to the rule against sovereign immunity for *in rem* actions

against immovable property held within *another* sovereign's jurisdiction.[1]

I. OIN misreads *Sherrill*.

OIN argues that there was no issue of sovereign immunity from suit in *Sherrill*. Opp. at 22. OIN concedes that footnote 7 stated that "'tax immunity' was not a defense to eviction" (*id.* at 23) but reads this as rejecting only immunity "from the underlying taxation." That reading ignores the procedural posture of the eviction action, the context and text of footnote 7, and the relation of footnote 7 to the dissent. *See* Petition at 3-6 & nn.2-3. The case went to the Second Circuit and then came to this Court in an enforcement posture, and OIN unsuccessfully asserted its alleged sovereign immunity from suit. *Id.* at 3-4. In arguing that it did not raise the defense of sovereign immunity from suit in this Court in *Sherrill* (despite having asserted that defense in its answer and other pleadings in the lower courts), OIN is admitting that it abandoned that defense and therefore waived it.

II. OIN misstates *Yakima*.

OIN argues, "[q]uite simply, there was no tribal sovereign immunity issue presented in [*Yakima*] and no

1. OIN argues that several conflicting decisions are distinguishable because they involved zoning and condemnation issues, rather than the supposedly "distinctive" issues involved in tax foreclosures. Opp. at 20-21 & n.10, 26-28. But *Sherrill* squarely rejected that claimed distinction, emphasizing that that there is no basis to treat tax enforcement proceedings differently from other types of state and local *in rem* jurisdiction over real property held within their jurisdiction. *See* 544 U.S. at 214 n.7, 219-20 & n.13.

issue of foreclosure of tribally owned land." Opp. at 24. That statement is belied by the record and by the decisions of this Court and the Ninth Circuit in *Yakima*. *See Yakima*, 502 U.S. at 256 (noting that "Yakima County proceeded to foreclose on properties throughout the county for which ad valorem . . . taxes were past due, including a number of reservation parcels in which the Tribe or its members had an interest . . ."); *Confederated Tribes and Bands of the Yakima Nation v. County of Yakima*, 903 F.2d 1207, 1208-1209 (9th Cir. 1990) ("This case concerns the power of the State of Washington to levy *and collect* ad valorem . . . taxes . . .") (emphasis added). The Yakima Nation sought an "injunction against the future levy or collection of taxes" and specifically sought to enjoin the sale of "28 parcels of fee land at a tax sale." *Id.* *See* Pet. Br. *County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, Nos. 90-408, 90-577, 1991 WL 521727, at *5 (noting Tribe brought action "seeking injunctions against . . . the foreclosure sale of those tribal-owned and member-owned fee properties within the Reservation . . . ."). This Court recognized that Yakima County's power to impose the ad valorem taxes necessarily carried with it the concomitant power to collect that tax through foreclosure. *Yakima*, 502 U.S. at 256, 263-264; *see id.* at 274, 277-278 (arguing that Yakima County's attempts to "foreclose" and "seize" Nation-owned property presented "a threat to tribal integrity and self-determination. . . .") (Blackmun, J., dissenting). Given the record of tax enforcement proceedings in *Yakima*, and this Court's unconditional affirmance of Yakima County's right to impose and collect ad valorem property taxes (with a specific endorsement of *in rem* foreclosure proceedings), it is of no moment how the

parties chose to frame their questions presented or argue the case. The power to impose real property taxes must carry with it the right to collect those taxes through the enforcement tool of foreclosure, or the taxing power is meaningless. This Court in *Yakima*, as in *Sherrill*, did not endorse only a theoretical right to impose a tax that vanishes upon a tribe claiming sovereign immunity from suit. Rather, this Court in *Yakima* explained why tribal sovereign immunity from suit does not bar foreclosure because, as an *in rem* proceeding, it is not significantly disruptive of tribal sovereignty. *Yakima*, 502 U.S. at 265. Both the Second Circuit and OIN ignore this critical distinction between *in rem* and *in personam* jurisdiction. *See* Petition at 10-12 and n.6.

III. The Counties did not preempt, or attempt to preempt, the trust process.

OIN repeatedly accuses the Counties of attempting to "preempt" the trust process. Opp. at 1, 2, 10. That accusation is false and is an attempt to divert the Court's attention from the real issues in this case. As the Second Circuit specifically found, the Counties' foreclosure actions are neither inconsistent with the ongoing land-into-trust process nor mooted by that process.

Madison County initiated foreclosure proceedings in 2000, well before *Sherrill* or OIN's trust application in 2005. *See* CA App. A-34-41. After *Sherrill*, the Counties resorted to foreclosure only after OIN advised that it would continue to refuse to pay its taxes. The Counties never refused to negotiate but concluded they had no choice except to seek the only remedy available to them when a property owner refuses to pay its taxes.

The Counties' motive was not to preempt the trust process (of which they received official notice from the Department of the Interior months later), but to collect property taxes.

Significantly, on June 10, 2005 (months after OIN filed its trust application), Associate Deputy Secretary of the Interior James E. Cason advised OIN (after quoting the *Sherrill* text that refers to footnote 7), "Thus, it is our opinion that [the] Court in *City of Sherrill* unmistakably held that the lands at issue (property interests purchased by OIN on the open market) are subject to real property taxes. In the event these taxes are not paid, we believe such lands are subject to foreclosure." CA App. A-488. Secretary Cason's letter further stated the Department's policy was "not to accept into trust lands that are encumbered by tax liens. Accordingly, we urge the Nation to resolve any outstanding tax liens that may now encumber any of the lands for which you are seeking the United States to accept in trust." CA App. A-489. The letter does not suggest in any way that foreclosure would be viewed as an attempt to "preempt" the trust process. OIN resorted to a new round of litigation rather than pay the taxes.

The State and Counties (and others – *see* Opp. at 4 and n.2) are challenging the Secretary's decision to take over 13,000 acres into trust based on, among other things, Interior's failure to comply with applicable law and regulations, the so-called letters of credit,[2] and the absence of authority to take land into trust for OIN

2. Despite Interior's policy and regulations not to accept into trust lands that are encumbered by tax liens, OIN posted letters of credit instead of paying taxes. No other taxpayer may avoid (continued)

under *Carcieri v. Salazar*, ___ U.S. ___, 129 S. Ct. 1058 (2009). Those issues are not involved in this case despite OIN's argument (Opp. at 29) to the contrary. The Counties seek to maintain their communities and 200-year governance and to avoid the disruption of a new 13,000-acre reservation scattered over two counties and multiple cities, towns, villages and school districts.

The Counties did not attempt to preempt the trust process. Issues relating to the trust process are pending in a separate case and are not involved here. As the Second Circuit stated, developments after oral argument did not render moot any of the issues on appeal or affect its consideration of the appeal. Pet. App. at 12a-13a. Even if 13,000 acres are taken into trust, OIN will still refuse to pay taxes on 4,000 acres not in trust and other properties it buys in the future.

(continued)
paying property taxes by posting letters of credit which do not provide needed county revenues, eliminate tax liens, or avoid the disruption condemned in *Sherrill*. Moreover, the letters of credit are subject to conditions and limitations that materially impair their value. They are not assurance of payment or an adequate tender of payment. They impose various risks on the Counties, including credit risk related to the solvency of the issuer at the time a drawing is presented, termination risk if OIN should not renew them after they expire, unclear drawing conditions, and drawing conditions that may never be satisfied. Indeed, OIN has allowed letters of credit to lapse and to be underfunded.

IV. The decision below creates a "supersovereign" immunity not enjoyed by state and foreign sovereigns in comparable circumstances.

Far from requesting "a dramatic new judicial limitation" on tribal sovereign immunity (itself a judicially-created doctrine) (Opp. at 29), Petitioners are simply asking that tribes be subject to the same principles of sovereign immunity that govern foreign countries and States in similar circumstances. OIN fails to come to terms with *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924), and numerous other decisions holding that a State's sovereign immunity does not extend to *in rem* actions against immovable property held within another State's jurisdiction. *See* Town of Lenox *Amicus* Br. at 11-14. As this Court emphasized in *Sherrill*, rules of state sovereignty "provide a helpful point of reference" in tribal immunity cases even though they "do not dictate a result." 544 U.S. at 218 (doctrine of acquiescence). OIN offers no explanation *why* it should enjoy "super-sovereign" immunity greater than that of a State. *Chickasaw Nation*, 515 U.S. at 466.

Similarly, as to foreign sovereign immunity, all of the real property decisions cited by OIN (Opp. at 16-19) involve diplomatic and consular properties, which have always been subject to special rules not applicable here, and which *exempt* them from the traditional rule that real property in another country is subject to *in rem* proceedings and dispossession. *See* Town of Lenox *Amicus* Br. at 7-11.

OIN relies on other inapposite cases involving suits against federal property located within U.S. jurisdiction or state property located within state boundaries —

situations that plainly do not involve immovable property located in *another* sovereign's jurisdiction. *See* Opp. at 15-16. As to cases that *do* involve the traditional "immovable property" exception to rules of sovereign immunity — such as real property held by foreign nations and States outside the scope of their own territorial sovereignty – OIN fails to offer a single reason why it should enjoy broader immunity than a foreign nation or a State in similar circumstances.

V. The sovereign immunity question presented is of national significance and "real world" importance.

OIN argues that the sovereign immunity question presented is not of national significance and is based only on hypotheticals. Opp. at 1-2, 25-26. The *amici* States see it differently. *See* Brief for the States of New York, Colorado, Florida, Iowa, Michigan, South Dakota, Washington and Wyoming as Amici Curiae in Support of Petitioners, filed herein, at 1 ("the Second Circuit's reasoning imperils real property tax collection throughout the United States because it permits Indian tribes nationwide to escape enforcement of lawfully imposed real property taxes.")

In the real world, tens of millions of dollars in unpaid real property taxes are owed by OIN to the Counties. *See* CA App. 610-13, 1937-38. Nor are OIN's occasional so-called payments "in lieu of taxes" (Opp. at 6) an adequate substitute for satisfaction of those unpaid tax obligations. OIN characterizes such payments as gifts (called "Silver Covenant Chain of Friendship Grants"), and whether such gifts are made (or not) and in what

amounts is determined solely by OIN. Such voluntary and uncertain payments are no substitute for taxes and are not commonly understood as payments in lieu of taxes. For example, when OIN reneged on its promise to make such payments to a school district in Madison County, the school district found itself in "financial crisis." CA App. A-614-622; *see also* CA App. A-626-629 (unilateral revocation of OIN gift to school district and failure to pay school taxes caused "fiscal chaos," "contributed significantly to the need for an increase of 22% in the tax rate," and "resulted in a significant, unnecessary and unjustified hardship to the students and taxpayers of the community").

OIN cites post-*Sherrill* tax agreements with the small cities of Oneida and Sherrill in support of its argument that "it would simply be inappropriate to presume that the traditional means of dispute resolution involving tribal sovereigns will prove unsuccessful." Opp. at 2, 5-6. Citing a hearsay ("Although I was not present at the meeting") affidavit of its lawyer about one post-*Sherrill* meeting to explore resolution "of all outstanding disputes," OIN claims the Counties refused to negotiate over payments of penalties and interest. Opp. at 6, citing CA App. at A-631. To the contrary, the Counties have made multiple unsuccessful attempts through the years to negotiate the resolution of various disputes with OIN, which have been rejected by OIN.

OIN argues "any new limitations on immunity from suit should be left to Congress." Opp. at 28. To follow this Court's decisions in *Sherrill* and *Yakima* would not create "new limitations" on tribal immunity from suit. As shown in the Counties' petition, neither *Potawatomi*,

Kiowa, nor any other decision by this Court stand for the proposition that tribes have sovereign immunity from *in rem* proceedings against non-trust property they hold *outside* their tribal jurisdiction. Indeed, this Court has squarely held that tribal *personal* property that is tax-delinquent may be seized when outside the tribe's jurisdiction. *See, e.g., Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). Given the "primeval" importance of a sovereign's control over real property within its jurisdiction and regulatory authority, *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984), it would be irrational to allow *in rem* actions against tax-delinquent *personal* property but not against tax-delinquent tribal *real* property.

VI. Oneida territory in New York has consisted of only 32 acres since the early 20th Century.

In *Sherrill*, this Court recognized that by 1838, "the Oneidas had sold all but 5,000 acres of their original reservation" and "during the 1840's, sold most of their remaining lands to the State." 544 U.S. at 206-207 (citations omitted). "That acreage dwindled to 350 in 1890; ultimately, by 1920, only 32 acres continued to be held by the Oneidas." *Id.* at 207. It is not only the 1838 Treaty of Buffalo Creek that diminished or disestablished the Oneida reservation but also the historical realities described in *Sherrill*. To ignore these realities and to perpetuate a questionable pre-*Sherrill* finding that there is a "not disestablished" Oneida reservation of some 250,000 acres can only perpetuate uncertainty, jurisdictional and tax disputes, and community disruption in Madison and Oneida Counties.

CONCLUSION

The petition for a writ of certiorari should be granted.

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AMICUS CURIAE BRIEF

No. 10-72

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

MADISON COUNTY, NEW YORK, *et al.*,

Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK,

Respondent,

STOCKBRIDGE-MUNSEE COMMUNITY, BAND OF MOHICAN INDIANS,

Putative Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR CAYUGA COUNTY AND SENECA COUNTY AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici will address whether the ancient Oneida reservation in New York was disestablished or diminished — the second question presented for review in Madison and Oneida Counties' ("Petitioners") petition for a writ of *certiorari*.

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INTEREST OF THE *AMICI CURIAE*[1]

Although the historic boundaries of the Oneidas' claim to an 18th-century reservation do not lie within Cayuga County or Seneca County, the *amici* have a compelling interest in this dispute because it involves an Indian group's claim to sovereignty rights on ancient but long-abandoned land. *Amici* respectfully submit that this Court must clarify the status of the ancient Oneida reservation to provide guidance to other litigants. Uncertainty about the status of ancient Indian reservations in Upstate New York continues to cause conflict between Indian and non-Indian communities, and courts repeatedly look to federal law when applying state statutes in order to determine if subject land constitutes a reservation. Just as the Court of Appeals for the Second Circuit in this case concluded that the Oneidas' reservation was not disestablished, and thus not ultimately subject to taxation, the New York Court of Appeals effectuated a similar flawed result in *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614 (2010). In that case, the Court of Appeals relied on federal law to determine that each of the two parcels of land recently purchased by the Cayuga Indian Nation after two centuries of non-Indian ownership were located on a federal reservation and was therefore exempt from state cigarette sales and excise taxes.

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1. This *amici* brief is presented pursuant to this Court's Rule 37.4; the counties' authorized law officers appear as co-counsel. Counsel of Record for all parties have received notice of *amici*'s intention to file this brief more than 10 days prior to the brief's due date.

Even though a determination about the status of the Oneida reservation may not be dispositive on the issue of the status of other ancient reservations, this Court's review of this case would provide much needed guidance to other litigants and courts in New York struggling to resolve similar contentious issues.

ARGUMENT

LOWER COURTS NEED CLARIFICATION FROM THIS COURT TO SETTLE EXISTING CONFLICTS AND TO PREVENT FUTURE CONFLICTS REGARDING THE STATUS OF AND RIGHTS ASSOCIATED WITH ANCIENT TRIBAL LANDS.

Even though the Second Circuit below stated that "a tribe's immunity from suit is independent of its lands," it nevertheless reaffirmed its earlier finding that the Oneidas' reservation was not disestablished. *Oneida Indian Nation of New York v. Madison County and Oneida County,* 605 F.3d 149, 152 (2010). A review of that decision would clarify the status of hundreds of thousands, if not millions, of acres of ancient land in Upstate New York and the United States.

Much like Petitioners in this case, *amici* contend in their own petition for writ of *certiorari* from the New York Court of Appeals' decision in *Cayuga Indian Nation v. Gould* that this Court's decision in *City of Sherrill, New York v. Oneida Indian Nation of New York,* 544 U.S. 197 (2005), has been misinterpreted and misapplied. *Amici* contend that the New York Court of Appeals improperly bypassed *City of Sherrill* when it in effect held that the Cayuga Indian Nation rekindled

aspects of sovereignty when it repurchased ancient lands after two centuries of non-Indian ownership and governance. *Amici* also contend that the Court of Appeals incorrectly applied federal treaties and statutes and mistakenly concluded that the Cayuga Indian Nation's recently-purchased parcels of land constitute a "federal reservation" that had not been disestablished. The New York Court of Appeals' ultimate decision that the Cayuga Indian Nation possessed a federal reservation in Upstate New York – when that purported "reservation" was sold pursuant to valid treaties and owned by non-Indians for centuries – demonstrates with clarity that there are reasons, beyond this case, for the Supreme Court to determine whether federal reservations, in fact, remain under such circumstances. Although *amici's* arguments against the existence of a federal Cayuga reservation in *Cayuga Indian Nation v. Gould* are not identical to Petitioners' arguments here, Cayuga and Seneca Counties' concerns regarding the interpretation and meaning of "reservation" and rights associated therewith under federal law are quite relevant.

While the Second Circuit noted that it need not reach the issue of disestablishment, *see Oneida Indian Nation v. Madison County and Oneida County*, 605 F.3d at 152 n.6, there is no question that the status of the Oneida reservation is an important issue that needs to be resolved. The *amici's* ongoing dispute with the Cayuga Indian Nation presents another scenario that highlights the need for clarification of the status of ancient Indian reservations.

A. As in *Cayuga Indian Nation v. Gould*, there is a question here as to whether there ever was an Oneida federal reservation in New York State.

In *Cayuga Indian Nation v. Gould*, the New York Court of Appeals began its analysis of the history relevant to the purported existence of a federal reservation by discussing the 1794 Treaty of Canandaigua, but, as the Cayuga and Seneca Counties argued, one cannot properly analyze whether there ever was a federal reservation without going further back in time. On February 25, 1789, the Cayugas and New York State signed a treaty, the first paragraph of which states: "First: the Cayugas do cede and grant all their lands to the people of the State of New York, forever." The only interest the Cayugas held in any portion of the ceded lands after 1789 was a limited use right granted by the State in the second article of the treaty: "Secondly: the Cayugas shall, of the said ceded lands, hold to themselves, and to their posterity, forever, for their own use and cultivation, but not to be sold, leased, or in any other manner aliened, or disposed of to others, all that tract of land, beginning at . . ." By the express terms of the treaty, the Cayugas ceded their lands to the State, which then granted to the Cayugas a right of "use and cultivation" in the same. Importantly, in the 1789 Treaty, New York State reserved for itself the exclusive right to purchase back the reservation it had created. *See Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 268-69 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006).

The United States Constitution took effect and the United States government began functioning as a federal government on March 4, 1789 — after the 1789 Treaty was signed. *See e.g., Oneida Indian Nation v. New York*, 691 F.2d 1070, 1079 n.6 (2d Cir. 1982). The Articles of Confederation did not prohibit or require the assent of Congress for the transfer of Indian land. *See Oneida Indian Nation of New York v. New York*, 860 F.2d 1145, 1167 (2d Cir. 1988). As a result, at the time of the 1789 Treaty, New York could — and did — lawfully exercise its right to extinguish whatever interests the Cayugas had in the subject land. *See id.* The United States itself put forth exactly this argument before the American and British Claims Arbitration Tribunal in 1926, and the Tribunal concluded that the 1789 treaty "was made at a time when New York had authority to make it, as successor to the Colony of New York and to the British Crown," and that "[t]he title of New York . . . was independent of and anterior to the Federal Constitution." *Cayuga Indian Claims*, 20 Am. J. Int'l L. 574, 590, 591 (Am. & Br. Claims Arb. Trib. 1926).

The Court of Appeals, however, held that in the 1794 Treaty of Canandaigua, the United States recognized that the Cayuga Indian Nation possessed a federal reservation. It is respectfully submitted that this holding was incorrect. In fact, the United States merely acknowledged in the Treaty of Canandaigua that the Cayugas had certain rights to the land derived from the 1789 Treaty with New York. The Treaty of Canandaigua

did not establish any new rights, much less a federal reservation. Article II of the treaty provides in full:

> The United States *acknowledge* the lands reserved to the Oneida, Onondaga and Cayuga Nations, *in their respective treaties with the state of New York*, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

7 Stat. 44, Art. II (emphasis added). As is apparent from this language, the United States did not purport to reserve any land by virtue of the Treaty of Canandaigua in 1794; it merely "acknowledged" that New York reserved certain rights to the land for the Cayugas after it extinguished whatever Indian title the Cayugas held. Similarly, the United States did not purport to create a reservation by virtue of the Treaty of Canandaigua, but merely acknowledged that the lands constituted a state reservation under the 1789 Treaty with New York and promised not to disturb the Cayugas' use of the land pursuant to that treaty.

The Treaty of Canandaigua did not convey an interest in land to the Cayugas and did not divest New York of its rights. *See Seneca Nation of Indians v. United States*, 173 Ct. Cl. 917, 922 n.5 (1965) (explaining

that the purpose of the Treaty of Canandaigua was to "reconfirm peace and friendship between the United States and the Six Nations . . . [T]here was no purpose to divest New York and Massachusetts of their right, nor was there any purpose to prevent or to supervise sales or transfers of [subject] territory."). The New York Court of Appeals' misconstrued the Treaty of Canandaigua because the United States did not have the power to grant or confirm a title to land when the sovereignty and dominion over it had become vested in New York State. *See Goodtitle v. Kibbe*, 50 U.S. 471, 478 (1850) (holding that Congress could not grant an interest in land that belonged to Alabama). After 1789, New York held the land in fee subject only to limited use rights granted to the Cayugas pursuant to state law. The federal government had no property rights in the lands and could not confer "recognized title" without illegally depriving New York of its property rights.

Although the Supreme Court has not held that the treaty-making power of the United States extends to the divestment of a state's interest in land, it has observed that if such authority were to exist, it must be shown unmistakably in the treaty. *United States v. Minnesota*, 270 U.S. 181, 209 (1926) ("[N]o treaty should be construed as intended to divest rights of property — such as the state possessed in respect of these lands — unless the purpose so to do be shown in the treaty with such certainty as to put it beyond reasonable question."). The Treaty of Canandaigua makes no mention of an intent to divest New York of its property rights, and there is no historical evidence that the federal government intended the Treaty to divest New York of its interest. Indeed, the language of the

Treaty of Canandaigua confirms that the United States explicitly acknowledged New York State's treaty with the Cayugas.

The 1788 Treaty of Fort Schuyler between the Oneida Nation and the Colony of New York was virtually identical to New York's 1789 Treaty with the Cayugas. New York purchased all of the Oneidas' lands and granted them land use rights to approximately 300,000 acres. *See Sherrill*, 544 U.S. at 203. The Treaty of Canandaigua did nothing more than acknowledge the 1788 Treaty, and, just as *amici* argued in *Cayuga Indian Nation v. Gould*, the United States could not and did not convey any interest to the Oneida by the Treaty of Canandaigua.

If the Treaty of Canandaigua established a federal Cayuga or Oneida reservation, then in so doing the United States violated the Fifth Amendment to the Constitution. The United States' power of eminent domain extends to the taking of state-owned property without the state's consent, but the United States must pay just compensation to the property owner for the property it takes. U.S. Const. amend. V; *see also Block v. North Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273, 291 (1983). A compensable taking occurs "[i]f a government has committed or authorized a pelinanent physical occupation of [the] property." *Southview Assocs. v. Bongartz*, 980 F.2d 84, 92-93 (2d Cir. 1992). Under this standard, if by the Treaty of Canandaigua the United States took New York's property rights in the subject lands, then New York State would have been entitled to compensation for that taking. No such compensation was ever given. Because

compensation was never paid to New York, even if the Unites States attempted to effect a taking by the Treaty of Canandaigua, it was incomplete and no property interest passed to the Cayugas or the Oneida. *See United States v. Dow*, 357 U.S. 17; 21 (1958) (holding that title does not pass until the owner receives compensation).

B. If a federal Oneida reservation ever existed, it was disestablished.

As Petitioners assert, any federal Oneida reservation that may have existed has long been disestablished, and there is no present-day Oneida reservation in central New York. Circumstances surrounding disestablishment of reservations are central to ongoing disputes between Indian and non-Indian communities, and recurring issues are raised during those disputes. For example, *amici* argued in *Cayuga Indian Nation v. Gould* that if a federal Cayuga reservation was created by the Treaty of Canandaigua, any such reservation was disestablished when the Cayugas sold to New York State whatever land use rights they had in the subject land in 1795 and 1807. In support of their assertion, *amici* argued that the federal government's involvement in the negotiation, consummation and subsequent implementation of the 1795 and 1807 conveyances constituted federal ratification of those treaties. Not only did federal officials actively participate in the treaty process and attend the negotiations and signing of the 1795 and 1807 treaties, but the federal government distributed New York's payments to the Cayugas. *See Cayuga Indian Nation of New York v. Cuomo*, 730 F. Supp. 485,

(N.D.N.Y. 1990) (discussing involvement of federal officials Jasper Parrish and Israel Chapin Jr. in the negotiation and signing of the 1795 and 1807 treaties and Parrish's transmittal of consideration paid by New York State to the Cayugas for the acquisition of the Cayuga land); *Cayuga Indian Nation v. United States*, 36 Ind. Cl. Comm. 75, 92, 96 (1975) (noting that Parrish and Chapin signed the 1795 treaty and that Parrish attended the signing of the 1807 treaty as the United States Superintendent of Indian Affairs).

In 1910, the United States and Great Britain entered into an agreement to establish an arbitral tribunal to resolve certain claims between the two governments. Among these was a claim by Great Britain on behalf of the Cayuga Indians of Canada, related to New York State's refusal to pay part of the annuity provided for by the 1795 Treaty to the Canadian Cayugas. *See Cayuga Indian Claims*, 20 Am. J. Int'l. L. 574, 576 (Am. & Br. Claims Arb. Trib. 1926). The agreement and the list of claims to be resolved were approved by the Senate. By this agreement, the United States recognized that the obligations under the 1795 Treaty were enforceable and could be adjudicated in an international forum. In 1926, the American and British Claims Arbitration Tribunal published its decision requiring the United States to pay $100,000 to Great Britain as trustee for the Canadian Cayugas. *See Id.* at 594. Thereafter, President Coolidge, with the approval of both houses of Congress, included in the federal government's budget the funds required to pay the award. *See Cayuga Indian Nation v. Cuomo*, 730 F. Supp. at 492. By payment of the Tribunal's award, the federal government plainly and unambiguously

recognized the 1795 treaty as a valid conveyance and the source of its liability.

Finally, *amici* argued, the Treaty of Buffalo Creek is the ultimate evidence that, at least as of 1838, no federal Cayuga reservation existed. The New York Court of Appeals, citing the Second Circuit's decision in *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 226, 269 n.2 (2d Cir. 2005), noted that that "the Treaty of Buffalo Creek neither mentions Cayuga land or Cayuga title in New York, nor refers to the 1795 or 1807 treaties between New York and the Cayuga." However, the Court of Appeals' conclusion that there is a federal Cayuga reservation which has not been disestablished is illogical. The Treaty of Buffalo Creek confirms the Counties' assertion that the Cayuga reservation was either never established as a federal reservation or had long been disestablished by the time of the Treaty of Buffalo Creek in 1838. Had there been a federal Cayuga reservation in existence at the time of the Treaty of Buffalo Creek, that treaty would have specifically mentioned any such reservation either as land to which rights were being relinquished or land to which Indians reserved rights. Instead, the Treaty of Buffalo Creek provides for compensation of the Cayugas upon their removal from New York State to the west, and refers to the Cayugas as "friends" of the Senecas.

The Treaty of Buffalo Creek is, of course, much more germane to the case at hand. Much like the Cayugas did in 1795 and 1807, the Oneida Nation sold its land use rights for all but 5,000 acres of the state reservation created by the Treaty of Fort Schuyler. *See Oneida Indian Nation v. Madison County and Oneida County*,

605 F.3d at 152. The Treaty of Buffalo Creek provided that the Oneidas still residing in New York state in 1838 were to remove to their new homes in the midwest and make arrangements with the governor of New York for New York to use its right of reversion and purchase the remaining rights the Oneida had in any lands within New York State. *See* Treaty of Buffalo Creek, art. 13. The Treaty of Buffalo Creek explicitly named the Oneida and provided for their removal from New York. The federal government could not have more clearly disestablished anything that may have been left of a purported federal Oneida reservation.

Amici submit that the historical record indicates that there was never a federal Cayuga or Oneida reservation in New York State, and that even if any such reservation ever existed, it has long been disestablished. As long as courts around the country look to federal law to interpret the meaning of the word "reservation" within state statutes, the need for clarity from the highest court as to what constitutes a present-day federal reservation will only grow.

CONCLUSION

For the foregoing reasons, there exist important issues of federal law that need to be determined by this Court and the petition for a writ of *certiorari* in this case should therefore be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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ONEIDA COUNTY, NEW YORK, PETITIONERS

v.

ONEIDA INDIAN NATION OF NEW YORK AND
STOCKBRIDGE-MUNSEE COMMUNITY,
BAND OF MOHICAN INDIANS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION, CITIZENS EQUAL RIGHTS ALLIANCE AND CENTRAL NEW YORK FAIR BUSINESS AS AMICI CURIAE SUPPORTING PETITIONERS

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MOTION FOR LEAVE TO FILE
BRIEF AMICI CURIAE

Citizens Equal Rights Foundation (CERF) (1), Citizens Equal Rights Alliance (CERA)(2) and Central New York Fair Business (CNYFBA) (3), (collectively "the Amici"), by their undersigned counsel, respectfully move for leave to file the attached brief as amici curiae in support of the Petition for Writ of Certiorari. The Amici have requested and obtained the written consent to file this brief from Petitioners, Madison County and Oneida County.

The Oneida Indian Nation (OIN) of New York, Respondent, was requested but refused.

The Petition seeks review of the decision of the United States Court of Appeals for the Second Circuit affirming the judgment of the district court that ruled the "OIN is immune from the Counties' foreclosure actions under the principle that "(a)s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."

The subject of this litigation involves application of federal Indian common law to pre-empt state law.

Moreover, the case concerns the application of this Court's decision in City of Sherrill v. Oneida Indian Nation, 544 U.S 197 (2005). CERF and CERA filed an amici curiae brief in the City of Sherrill case in support

of the City of Sherrill and have continued to have a substantial interest and involvement in the proper application of the decision.

Specifically, the Amici have a substantial interest in this litigation for several reasons. The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA), a South Dakota non-profit corporation with members in 34 states. CERF was established to protect and support the constitutional rights of all people, both Indian and non-Indian, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights. CERF has a critical interest in this case, as the extension of the decision of the Second Circuit as precedent will affect CERA members who own various assets and pay property taxes on fee lands near tribal fee property all over the United States. Starting with the amicus curiae briefs in City of Sherrill and Carcieri v. Salazar, (2009). CERF has maintained a consistent position on limiting the Indian Reorganization Act (IRA) to only those tribes occupying actual federal Indian reservations in the Western United States. This brief continues the discussion requiring the repetition of some facts and adds new facts on how the IRA was implemented by the Indian Organization Division of the Bureau of Indian Affairs not previously presented to this Court. See http://www.narf.org/sct/sherrill/amiciequalrightsfoundation.pdf and http://www.narf.org/sct/carcieri/ merits/cerf_et_al.pdf.

The Central New York Fair Business, Inc., incorporated in the State of New York, is headquartered in the City of Oneida. It is the purpose

of Fair Business to identify and address significant issues affecting the equality of business opportunity in central New York. Allowing the Oneida Indian Nation to assert sovereign immunity over fee lands to avoid the payment of property taxes will adversely affect all citizens of New York by creating an unequal business advantage and exempting the Oneida Indian Nation (OIN) enterprises from the laws of the State of New York and the regulatory authority of the Counties.

Members of the Central New York Fair Business, Inc., further are resident citizens of Madison and Oneida Counties. They are homeowners and business owners in the area where the parcels at suit are located. They share common roads; common underground water aquifer; and, common streams. They will be impacted as taxpayers by public costs resulting from any proposed use of the parcels made by the OIN, including the impacts of the casino or its expansion. Any proposed use of the parcels by the OIN could affect their property values, character of the community and community safety if the civil and criminal jurisdiction of New York and the Counties are not applicable to the parcels because of tribal sovereign immunity. CERA and CNYFBA are also actual parties in the litigation against the Record of Decision to take most of the parcels of land at issue in the City of Sherrill case into trust using 25 U.S.C. § 465 and the Part 151 regulations

Third, the Amici are experienced in and have been committed to furthering their interests by filing amicus briefs in other cases that have dealt with issues similar to those raised in this litigation.

The Amici are very familiar with the questions involved in this litigation and have reason to believe that one

significant legal question may not be fully addressed by Petitioner. Additional briefing would assist this Court in determining whether to accept the Petition for Certiorari.

The Amici have a longstanding commitment to safeguarding the civil rights of all Americans, and have an abiding interest in the welfare of all Americans, including the Oneida Indians of New York. For these reasons, and those set forth in the attached brief, the Amici respectfully request leave to file a brief amici curiae.

Respectfully submitted,

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INTEREST OF THE AMICI CURIAE

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Madison and Oneida Counties filed a general consent to any and all amicus curiae briefs that applies to the filing of this Amicus Brief.[1] The Oneida Indian

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than amici curiae, CERF and CNYFBA, its members or its parent

Nation denied consent through Michael R. Smith to the filing of this brief. Therefore this brief is accompanied by a motion requesting this amici brief be filed.

SUMMARY OF THE ARGUMENT

The first section of this brief addresses the land status of the former and present state reservation lands and whether those lands qualify as federal "Indian country." This discussion includes how the lower courts and Second Circuit incorrectly applied the prior decision in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) to reach the erroneous conclusion that the former Oneida reservation is "Indian country." The second section discusses tribal sovereign immunity and how treating the separate tribal governments created by the Indian Reorganization Act as Article 1 territorial governments affected federal case law on sovereign immunity. The final section of this brief explains why the Indian Reorganization Act was originally limited to only those tribes occupying federal Indian reservations on lands reserved before statehood and why this Court needs to continue to limit the Indian Reorganization Act to only those Indian tribes so situated in June 1934 to protect state sovereignty and equal protection of the law for all individual Americans.

ARGUMENT

The Second Circuit concluded that since the land parcels owned in fee are still "Indian country," the

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CERA's members, or its counsel have made any monetary contribution to the preparation or submission of this brief.

Oneida tribe enjoys sovereign immunity from the counterclaims brought by Madison and Oneida Counties (Counties) for unpaid property taxes. The Second Circuit made this conclusion while agreeing that in City of Sherrill that this Court held that a state reservation was created by the Treaty of Fort Schuyler in 1788 before the Constitution of the United States took effect. The Second Circuit also concluded that even though the former reservation had been under the continual jurisdiction of the state of New York it was still federal "Indian country."

The Counties petition emphasizes the wrongness of the doctrine of sovereign immunity applying to the Oneida. The Counties attempt to challenge the Second Circuit's conclusion that the taxed parcels are "Indian country" by alleging the Oneida reservation was disestablished or diminished as a matter of federal law. While the *Sherrill* ruling calls into question the equity of reestablishing long extinguished rights of tribal sovereignty, it did not expressly reach the issue of whether the former state reservation of land is or is not presently federal "Indian country."

I. THE CITY OF SHERRILL DECISION OF THIS COURT OVERRULED THE PRIOR RULING OF THE SECOND CIRCUIT THAT THE LANDS PURCHASED BY THE ONEIDA INDIAN NATION WITHIN THE FORMER RESERVATION BOUNDARIES WAS 'INDIAN COUNTRY"

a. The Ruling on Laches

The Second Circuit concluded that this Court had explicitly not decided whether the Oneida reservation was disestablished in the City of Sherrill decision. It therefore reasoned that its prior holding determining that the parcels were "Indian country" was not overruled by this Court. Appendix A, 16a-17a, footnote 6. If the Second Circuit had concluded that the land parcels were not "Indian country" the OIN could not claim sovereign immunity to avoid the property taxes.

The City of Sherrill ruling can be applied to prove that the parcels subject to taxation cannot be federal "Indian country." As submitted by CERA and CNYFBA in their pending Motion for Reconsideration in, 6:08-cv-00660-LEK-GJD, one of the pending fee to trust cases against the Secretary of the Interior, the conclusion by the Second Circuit that the former reservation land was federal "Indian country" was expressly reversed by the application of the doctrine of laches. By definition, laches stands for the proposition that as a matter of equity the matter cannot be brought up because too much time has passed. The Supreme Court expressly held that it would upset "justifiable expectations" to allow the claim. *Sherrill* at 215-7.

Under the Federal Rules of Civil Procedure a dismissal under the doctrine of laches is a dismissal pursuant to Rule 12(b)(6) for failure to state a claim. If on a motion made under Rule12(b)(6) matters outside the pleading are presented then the motion is treated as a motion for summary judgment. Fed. R. Civ. Pro. 12. See also *Lennon v. Seaman*, 63 F.Supp.2d 428, 438-9 (S.D.N.Y. 1999). Therefore, the Supreme Court by expressly reversing the judgment of the Second Circuit by applying laches and precluding the hearing of the Oneida's claim that the land was not under the sovereign jurisdiction of New York nullified all the factual findings and legal conclusions of the Second Circuit ruling in the *Sherrill* case.

In addition, the Supreme Court ruling in *Sherrill* applied laches to expressly reject that the Oneida Indians could assert any sort of sovereignty over the reacquired parcels. Justice Ginsburg addressed the factual background from the standpoint that the land in question had been under state jurisdiction since 1805. *Sherrill* at 202. Determining that an area is federal Indian country is a determination that the area is under federal jurisdiction. Justice Ginsburg specifically concludes that the land is under state jurisdiction, it therefore cannot be under federal jurisdiction or be "Indian country." This legal conclusion alone overrules by implication the Second Circuit conclusion that the land is currently "federal Indian country" that entitles the OIN to claim sovereign immunity to avoid taxation.

b. The Counties argue that the Oneida Reservation was Disestablished or Diminished

Justice Ginsburg concluded that the Oneida Indian reservation was established by the Treaty of Fort Schuyler in 1788. This treaty was between the State of New York and the Oneida Indian Nation. It was in effect before the Constitution of the United States went into effect in 1789. The Oneida tribe ceded all of its lands to New York and then the state reserved for the use of the Oneidas the land they mutually agreed the Oneidas would retain for their occupancy. *Sherrill* at 205. The Supreme Court further clarifies its opinion in Footnote 1, directly citing the Second Circuit's previous 1988 decision that the Oneida reservation was a reservation of state land. Sherrill at 203-4.

Justice Ginsburg continued that the Treaty of Canandaigua in 1794 "acknowledged" the Oneida reservation. Then explains what that acknowledgement meant and how the land stayed under state jurisdiction. *Sherrill* at 204-5. By contrast the Second Circuit concluded that the federal government in the 1794 treaty "recognized" the Oneida reservation. See 337 F.3d at 167. There is no such thing as the federal government "recognizing" an Indian reservation and thereby federalizing a state reservation of land. A federal Indian reservation can only be established by "reserving" federal public domain land for a group of Indians by treaty, executive order or congressional action. None of these occurred in New York because all of the land within the exterior boundaries of New York was under the jurisdiction of New York and not the

government of the United States.

This Court in the *City of Sherrill* ruling applied the equitable doctrine of laches to limit its holding in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974)(*Oneida I*) and *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (*Oneida II*) that allowed the Oneida Indian Nation to sue to claim aboriginal rights they contended were violated by New York not complying with the Nonintercourse Act of 1790, 25 U.S.C. § 177. The majority opinion in *City of Sherrill* expressly did not overrule Oneida II. Sherrill at 213. This Court in deciding *City of Sherrill* underestimated the confusion that resulted regarding the sovereignty of the State of New York by its decision in *Oneida I*.

This Court concluded in *Oneida I* that the federal right of occupancy or "Indian title" was vested in the United States for all Indian land. *Oneida I* at 667-70. It even concluded that this doctrine of a federal right of occupancy was absolute and applied to the original colonies as interpreted in *Fletcher v. Peck*, 10 U.S. 87 (1810) and *Worcester v. Georgia*, 31 U.S. 515 (1832). This led to the conclusion that the Oneida Indian Nation had a present right of occupancy over the former state reservation and could sue the State of New York to reassert its sovereign rights. After 30 years of litigation in various federal court actions, this Court decided in *City of Sherrill* that the doctrine of laches applied to the claims of the OIN to prevent the OIN from rekindling embers of sovereignty that had long ago grown cold but did not expressly overrule any of the prior holdings against the State of New York and Counties. This means that there is still an absolute

federal right of occupancy or "Indian title" in OIN that as a matter of equity will not be heard but can serve as the basis for the OIN retaining inherent sovereignty over the former state reservation to have tribal sovereign immunity from paying property taxes. It is not surprising that attorneys and judges in New York are confused by federal Indian common law that allows extinguishing inherent tribal sovereignty by diminishing or disestablishing the land base of a federal reservation while under *Oneida I* the "Indian title" can never be extinguished from the state reservation.

II. TRIBAL SOVEREIGN IMMUNITY

Federal Indian common law defines inherent tribal sovereignty as existing as long as "Indian title" (as was defined in *Johnson v. McIntosh*, 21 U.S. 543 (1823) and *Worcester v. Georgia*, 31 U.S. 515 (1832)) has not been extinguished. The holding in *Oneida I* concluded that the "Indian title" of the Oneidas was still in existence. The holding in *City of Sherrill* prevents the OIN from suing to reclaim its rights to rekindle a sovereignty that had long ago grown cold by applying the doctrine of laches. This statement from *City of Sherrill* implies that the OIN does not enjoy inherent sovereignty over the former state reservation. It is the disconnect between inherent tribal sovereignty and tribal sovereign immunity that creates the problem in this case. Inherent tribal sovereignty was severed from Indian title in *City of Sherrill* as explained above. The question then is what is the basis of tribal sovereign immunity if it is not based on inherent sovereignty?

This Court has already determined that the legal basis of tribal sovereign immunity makes the whole

doctrine suspect. *See Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751 (1998). The Court mistakenly allowed tribal sovereign immunity to continue because it assumed that Congress would act and define limits for the doctrine. Tribal sovereign immunity is a federal common law creation. If it is going to be limited, it is up to this Court to do it. As a recent law review article concludes, tribal sovereign immunity is now the strongest part of tribal sovereignty.[2] The law review article makes suggestions on how to use tribal sovereign immunity to make new claims of tribal sovereignty.[3]

a. Origin of Tribal Sovereign Immunity

Tribal sovereign immunity did not even exist until 1940 and the decision in *United States v. United States Fidelity and Guarantee Co. et al.*, 309 U.S. 506 (1940). This decision cites *United States v. Minnesota*, 305 U.S. 382 (1939) that extended federal sovereign immunity to the Indian Nations under the tutelage of the United States. *U.S. Fidelity* at 513, Fn 14. The Minnesota Court found that Section 2 of the IRA, 25 U.S.C. § 462, extending indefinitely the trust period for allotted lands had negated previous acts of Congress that gave the states specific rights to sue and condemn Indian allotments in state court without naming the United States as an indispensable party. *Minnesota* at 387. In *Minnesota v. United States*, the sovereign immunity of the United States was expanded to include

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[2] *See* Indian Country's Border: Territoriality, Immunity, and the Construction of Tribal Sovereignty, by Katherine J. Florey, Boston College Law Review Volume 51:595

[3] *Id.* at 649-53

all "Indian land" per a regulation promulgated in 1938. *Minnesota* at 390, Fn 7. One year later, the *U.S. Fidelity* Court extended federal sovereign immunity to cover tribal interests because of public policy. *U.S. Fidelity* at 512-4. This new public policy was created by the adoption of the Indian Reorganization Act (IRA) of 1934 as discussed in *U.S. v. Minnesota*. *Minnesota* at 387-90.

While the *Minnesota* and *U.S. Fidelity* cases expanded federal sovereign immunity and effectively made the federal courts the exclusive courts to hear claims to condemn Indian lands for public purposes, these cases do not actually decide that the sovereign immunity belongs to the Indian tribe. In fact, this Court in *U.S. Fidelity* concludes "It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did." *U.S. Fidelity* at 512.

It is not until *Puyallup Tribe v. Department of Game of Washington*, 433 U.S. 165 (1977) and *Santa Clara Pueblo v. Martinez*, 436 U.S. 39 (1978) that this Court reinterprets *U.S. Fidelity* to find independent tribal sovereign immunity as a matter of federal Indian common law. The Justice Department acting in an amicus capacity stated that the Solicitor General has no authority to waive the sovereignty of the tribe. Therefore, this Court was left to decide either the tribe had no sovereign immunity or the tribe's sovereign immunity is separate from the sovereign immunity of the United States. See *Puyallup* at 170-1. A similar ploy was used in *Santa Clara* by the Justice Department where they cut and pasted clauses from separate sentences in *U.S. Fidelity* to have this Court

conclude "But 'without congressional authorization,' the 'Indian Nations are exempt from suit.' *Id.* at 512." *Santa Clara* at 58.

As this Court correctly concluded in *U.S. Fidelity* and *Minnesota*, since the IRA was passed in 1934 all Indian land over which a tribe can exercise inherent sovereignty is held in trust for Indian tribes by the United States. Therefore, it is the sovereign immunity of the United States as the trustee to the Indians and as owner of the Indian land that is controlling. To hold otherwise allows the United States to be completely unaccountable when it supports the Indian tribes and individual Indians as federal instrumentalities to challenge state jurisdiction. This Court realized that it had been misled about the expansion of tribal sovereignty being "harmless" when it smacked into the loss of individual rights and state jurisdiction that would have occurred if the United States had been able to "sell" tribal criminal jurisdiction over non-Indians in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 201 (1978). Unfortunately, the realization that tribal sovereignty had to be restricted in keeping with their status as dependent sovereigns did not translate into the realization that tribal sovereignty was threatening the constitutional structure of federalism for almost twenty years. This Court should now consider limiting tribal sovereign immunity to comport with the IRA.

b. The City of Sherrill Ruling is Unenforceable if Tribal Sovereign Immunity Applies to the Parcels Owned in Fee by the Oneida Indian Nation

This Court ruled in *City of Sherrill* that the Oneida Indians cannot rekindle embers of sovereignty that have long ago grown cold. This statement is not accurate if the State of New York and the Counties of Madison and Oneida are prevented from enforcing state jurisdiction because of tribal sovereign immunity. Most importantly, the "unification theory" that inherent sovereignty through Indian title can somehow be rejoined to lands purchased in fee must be completely laid to rest. Nothing threatens state sovereignty more than a federal Indian common law theory that inherent Indian sovereignty can be restored to Indian tribes that have lands placed into trust status or reacquire fee ownership over lands within a former reservation. And this Courts ruling in *Oklahoma Tax Commission v. Potawatomi Tribe*, 498 U.S. 505 (1991) raises the very possibility that all lands placed into trust by the United States can restore tribal sovereignty by holding that all such lands are subject to tribal sovereign immunity. *Id.* at 511.

The question presented in *Potawatomi* was artfully constructed to misconstrue the federalism conflict. "The issue presented in this case is whether a State that has not asserted jurisdiction over Indian lands under Public Law 280 may validly tax sales of goods to tribesmen and nonmembers occurring on land held in trust for a federally recognized Indian tribe." *Id.* at 507. This characterization of the issue makes it

appear that the state refused to exercise jurisdiction over Indian land except to assess taxes on it. The parcel of land on which the convenience store that sold the cigarettes was situated was held in trust by the United States pursuant to the IRA. *Id.* at 507. In fact, the parcel where the convenience store was located was off reservation fee land that had probably been taken into trust pursuant to the IRA, 25 U.S.C. § 465. Id. at 511. For the first time the Oklahoma Tax Commission argued that these newly acquired off reservation lands should be treated as continuing under state jurisdiction. This Court summarily rejected the idea:

> "Here, by contrast, the property in question is held by the Federal Government in trust for the benefit of the Potawatomis. As in *John*,[United States v. John, 437 U.S. 634 (1978)] we find that this trust land is 'validly set apart' and thus qualifies as a reservation for tribal immunity purposes. 437 U. S., at 649."

Id. at 507. This conclusion directly contradicts the rationales in the more recent decisions of *Nevada v. Hicks*, 533 U.S. 353 (2001), *City of Sherrill v. Oneida Indian Nation*, *Carcieri v. Salazar and Hawaii v. Office of Hawaiian Affairs*, 129 S.Ct 1436 (2009) and many other rulings that have limited the removal of state jurisdiction by the United States on behalf of Indian tribes.

In this case, the conflict between Oklahoma Tax *Commission v. Potawatomi Tribe* and *City of Sherrill v. Oneida Indian Nation* could not be more stark. If the Second Circuit ruling is not overturned against Madison and Oneida Counties it will effectively negate

the City of Sherrill ruling.

III. STATE SOVEREIGNTY IS THREATENED BY FEDERAL INDIAN COMMON LAW

To fully grasp the nature of this threat to the sovereignty of the State of New York it is necessary to define the underlying policy of the IRA and that policy has been interplayed and expanded through federal Indian common law. As came to light in the briefing of Carcieri v. Salazar, the IRA as passed by Congress was not the very expansive original version of the IRA submitted by John Collier. This led to serious problems of the Bureau of Indian Affairs and the solicitors for the Department of the Interior over interpreting the very limited act actually passed by Congress. The Bureau of Indian Affairs had created a special division of Indian Organization on January 1, 1934 in anticipation of the passage of the sweeping IRA proposal. The Indian Organization Division (IOD) was the sponsor of the ten special Indian congresses that were held all over the country to promote the passage of Commissioner John Collier's IRA. This division led personally by Commissioner Collier made many promises at the conferences and in correspondence to specific tribes over how the IRA would help them to gain their support for its passage in Congress. Many promises were made by the IOD while legislation was pending that the IRA would apply to the tribes that no longer had a land base or tribal organization, including the California Indians. Congress in particular reacted negatively against the idea of "restoring" tribal identities in California that had been wiped out by the Spanish and Mexican Mission system.

Although the most extreme parts of Collier's IRA were removed by Congress, the IRA as passed by Congress did adopt Commissioner Collier's concept of creating separate tribal municipal governments. There is only one clause of the Constitution that contains authority for the federal government to establish local municipal governments: the Property Clause, Art. IV, Sec. 3, Cl. 2. The Property Clause expressly sets the authority of the Congress to acquire territorial lands and dispose of the territorial lands of the United States. The Property Clause also allows territorial land to be reserved for federal uses and to establish local governments to prepare the people in those areas for citizenship. *See United States v. Gratiot, et al*, 39 U.S. 526 (1840).

These "tribal governments" created by the IRA were not based on the traditional and often unique customs of the various tribes. In fact, the IOD for each region of the BIA created a model constitution for what the division considered the most advanced tribe that was only slightly modified for other tribes. The differences in the tribal constitutions between regions are minor. The solicitors and staff of the IOD in Washington, D.C. were solely responsible for the creation of all of these tribal constitutions that ape the three part system adopted for our national government and states. The tribal constitutions contain no checks and balances, no separation of powers and no defined court system of any kind although they all contain provisions for some type of tribal court to be set up. These tribal constitutions were obviously not written to be sustainable forms of government. There purpose was to educate the Indian people about our system of government. If a tribe voted to reject the mock

constitution given to them by the IOD, they lost the benefits of being an IRA tribe. In addition, no tribe even now can amend an IRA constitution without federal approval.

Commissioner Collier fervently believed that all "Indians" needed to learn to become good citizens of the United States and that the IRA should apply to all of them regardless of whether they lived on a federal Indian reservation or not. He believed Congress was wrong for limiting the application of the IRA in 25 U.S.C. § 479. Collier and the IOD became very creative in interpreting Section 479 to avoid its' limitations. The IOD through its own solicitors started court cases to expand or justify their interpretation of the IRA. This included solicitor Felix Cohen who was assigned by IOD to write the Handbook of Federal Indian Law. The blatant and aggressive actions of Collier and the IOD to expand the IRA to be more like Collier's original bill helped create the fervor in Congress to repeal the IRA just two years after it was made law. This Court contributed to this furor by allowing almost total deference to the IOD's interpretations of federal Indian policy in at least the four cases discussed below.

One of the first cases brought by suggestion of the IOD was *United States v. Minnesota*, 305 U.S. 382 (1938). The legislation of the IRA as passed did not repeal any of the prior allotment acts of Congress. It is through the federal Indian common law decision in Minnesota that the IOD could extend the IRA over all former allotted lands. The next case was *United States v. McGowan*, 302 U.S. 535 (1938). In *McGowan*, the BIA was allowed to characterize fee lands purchased for the Indian colony in Nevada to be defined as "Indian land."

By equating all types of "Indian land" as a matter of federal common law, the IRA is not confined to federal "reservations" as defined in Section 479. The IOD then used the Indian trust to invoke the paramount sovereign authority of the United States in *United States as Guardian of the Walapai v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941). This decision arguably makes all former "Indian land" federal "Indian country" again as a matter of federal Indian common law. These cases along with *U.S. Fidelity* to extend federal sovereign immunity over tribal interests to create "tribal sovereign immunity" as federal Indian common law discussed at length above were designed to get around the restrictions placed into 25 U.S.C. § 479. Collier and the IOD thought they had the IRA right where they had wanted it until Attorney General Robert Jackson at the urging of Congress created a "uniform policy to be followed by the departments and agencies of the Federal Government in securing jurisdiction over lands acquired by the United States" to stop Collier and the IOD from removing any lands from state jurisdiction without express state consent. Letter from Attorney General Jackson to Secretary of the Interior Harold Ickes, dated March 31, 1941, No. 151695, Record Group 75, Entry 132B, Departmental Memo, Box 1, BIA Orders. The actual form the state was required to complete is attached to the letter. When the Executive branch changed its position, this Court soon followed with the ruling in *Hynes v. Grimes Packing*, 337 U.S. 86, 123 (1949) that placed the federal Indian trust lands within the overriding context of the equal application of the law. Whether this application of equal protection was used to invoke a limitation of federal Indian common law by applying a rationale similar to the one used in *Erie Railroad Co. v.*

Tompkins, 304 U.S. 817 (1938) is not made clear by the decision.

Fundamentally the policy of the IRA was to create separate municipal like governments to be governed under Article I authority of the United States Congress just like all territories of the United States. To this day, all tribal courts derive their authority from the Administrative Article 1 Courts of Indian Offenses. By allowing the policy of the IRA to be expanded through Supreme Court rulings expanding federal Indian common law has threatened how Congress intentionally limited the IRA. It has also allowed the IRA to apply to bands of Indians not occupying reserved federal land or a federal enclave to directly challenge the sovereignty of the state by claiming to displace its jurisdiction over any land owned by "Indians."

With President Nixon's Message to Congress of July 8, 1970, the era of the Nixon Indian Policy began. It was based on making the policy of the IRA permanent. Because the Secretary claimed he could define which Indian tribes were "recognized" as a continuing power, the power claimed by President Nixon was unlimited by any constitutional restraints. As the first heading of the Nixon Message says: Self-Determination Without Termination. The policy goes on to articulate how any federal program can be delegated to tribal authority. This is unlimited Executive authority to define the Indian trust. No longer is there any deference to Congress required as this Court assumed in *United States v. Kagama*, 118 U.S. 375, 384-5 (1886). President Nixon took his newly declared "Indian trust" power without any act of

Congress and proceeded to the federal courts to have his assumed power legitimized as federal Indian common law. Starting with *Mescalero Apache v. Jones*, 411 U.S. 145 (1973) and *McClanahan v. Arizona*, 411 U.S. 164 (1973), this Court again allowed off reservation "trust responsibility" as it had previously acknowledged in *U.S. v. Minnesota*, *McGowan* and *Santa Fe Pacific Railroad*. This Court allowed the Nixon Administration to reinterpret the IRA into a permanent policy to intentionally threaten the constitutional structure and federalism. See *Morton v. Mancari*, 417 U.S. 535, 545 (1974). This virtually unlimited executive power is what the Supreme Court unleashed on the people and State of New York in holding that as a matter of federal Indian common law the Oneida Indian Nation could sue to claim its purported federal rights to its former Indian reservation in *Oneida I*.

b. The Sherrill Decision

This Court began placing the Indian trust power back within the structure of the Constitution of the United States with the *City of Sherrill* ruling by specifically rebalancing the equities to limit the jurisdiction of the federal courts to expand the "Indian trust" through federal common law rulings. *Sherrill* at 218-20. This Court in *Sherrill* expressly rejected the "unification theory" of the Nixon administration that allowed a merger of Indian title and fee ownership to restore tribal sovereignty to land that had been under state jurisdiction. *Id.* at 213-4. But *Sherrill* has not resolved the underlying problem of the loss of state jurisdiction to tax the parcels owned in fee by the Oneida tribe that are the subject of this case or the jurisdiction of Seneca

and Cayuga Counties to enforce state law to prevent the sale of untaxed cigarettes. In fact, the New York State Court of Appeals in *Cayuga Indian Nation v. Gould*, 2010 N.Y. Lexis 981 (May 11, 2010) expressed its own confusion on whether federal Indian law preempts state jurisdiction not knowing how to apply Sherrill against the direct assertions of the tribe and the United States that it does not have jurisdiction to enforce its laws on lands claimed to still have some federal protection.

Then on August 9, 2010 the Second Circuit used Sherrill to end all land claims by the Oneida in New York. See *Oneida Indian Nation of New York, et al. v. County of Oneida, et al.*, 07-2430-cv(L), 07-2548-cv(XAP), 07-2550-cv(XAP). It is very unlikely that the Oneida Tribes and United States will allow the Second Circuit to end forty years of land claim litigation expressly allowed by *Oneida I* and *Oneida II* without challenging the *Sherrill* decision. The *Sherrill* ruling also did not resolve the fee to trust issue in New York. The Secretary of Interior asserts the authority to take 13,004 acres of fee land into trust for the Oneida Indian Nation of New York. See Record of Decision, May 20, 2008. 73 F.R. 30144-30146. It is the position of Amici that fee to trust as currently interpreted in the Part 151 regulations is just another version of the same "unification theory" rejected in the *Sherrill* decision. As stated earlier in this brief, the *Sherrill* ruling does not correct forty years of the jurisdiction of the State of New York being challenged by the United States on the sole behalf of Indian tribes.

It is the position of Amici that the ruling in *Oneida I* that "Indian title" did not cede to the State of

New York along with the right of preemption in *Fletcher v. Peck* was a fundamental error in constitutional law that undermines state sovereignty. This is especially true because *Worcester v. Georgia* can be easily distinguished from the situation in New York by distinguishing the cession treaty of the Cherokee made with United States from the Treaty of Fort Schuyler that was made between the New York Indians and the State of New York. All sovereignty is based on the right to govern land. By removing "Indian title" from the original thirteen colonies, a significant power was removed from the bundle of authority left to the states and people that could be used to attack the very basis of state sovereignty. This fundamental mistake in weakening state sovereignty has been aptly demonstrated in New York by the constant and continual threats of removing land from state jurisdiction.

The removal of "Indian title" from the preemption rights of the original colonies could arguably make "Indian title" an asset of the United States subject to plenary authority under the Indian Commerce Clause, Art. I, Sec. 8, Cl. 3. Admittedly, this would be a major stretch of the legal concept of "Indian title." However, it would make sense as the basis for the so-called "unification theory" put forward by the Oneida Indian Nation in Sherrill. The idea that fee title could be unified with never extinguished "Indian title" to restore inherent tribal sovereignty is exactly the sort of theory that attorneys for the Nixon administration were promoting. See http//: citizensalliance.org Nixon Memorandum. Fungible "Indian title" could also be the underlying basis for tribal sovereign immunity applying when the tribe

claiming the immunity has no sovereignty over the land as in this case. Because decisions like *Oneida I* were made in the context of federal Indian common law, the federal courts accepted whatever the United States was proposing as long as it appeared to be on behalf of the Indians. No questions were asked about where the federal power came from because it was all under the "Indian trust relationship." As the Nixon Memorandum exposes, at least this one administration was more than willing to take advantage of using the Indians to massively expand Executive authority knowing they were unbalancing the Constitution and flaunting separation of powers. Once the policy was established, it is hard to imagine bureaucrats and politicians under any administration not reaching to use it.

It is time to correct this fundamental error in constitutional law and restore inviolable state sovereignty. This Court has laid the groundwork that allows for the rebalancing of the sovereign interests so important to maintaining our system of constitutional self-government. This case and the other cases coming to this Court from New York create the opportunity to rectify most of the harm that has been done against state sovereignty by the Nixon Indian policy.

CONCLUSION

The Court should reverse the decision of the Second Circuit.

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AMICUS CURIAE BRIEF

(5)

No. 10-72

IN THE

Supreme Court of the United States

AUG 12 2010

MADISON COUNTY and
ONEIDA COUNTY, NEW YORK,

Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, COLORADO, FLORIDA, IOWA, MICHIGAN, SOUTH DAKOTA, WASHINGTON, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, when a State or local government is authorized to impose real property taxes on real property owned by an Indian tribe, the government is nevertheless barred by tribal sovereign immunity from enforcing the tax through foreclosure or other *in rem* collection proceedings.

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INTEREST OF THE AMICI CURIAE*

States have a vital interest in safeguarding the economic health of their local political subdivisions, and in particular, in ensuring that local governments can collect real property taxes that Indian nations are obliged to pay on taxable tribal lands. The Second Circuit's holding that the petitioner counties cannot enforce their real property taxes on tribally-owned land that this Court recently held to be taxable, *see City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), has rendered the property taxes uncollectible and jeopardized the financial health and well-being of the petitioners as well as of local governments in other parts of New York that were once occupied by Indian tribes. *See, e.g., Cayuga Indian Nation of N.Y. v. Gould*, __ N.E.2d __, 2010 WL 1849339 (N.Y. May 11, 2010) (addressing the status of lands recently acquired by the Cayuga Indian Nation of New York).

In addition, the Second Circuit's reasoning imperils real property tax collection throughout the United States because it permits Indian tribes nationwide to escape enforcement of lawfully imposed real property taxes. Finally, by parity of reasoning, the decision substantially restricts the power of the States and local governments to enforce their regulatory jurisdiction over taxable tribal lands. The States and their local subdivisions have a vital interest in continuing to enforce the tax and regulatory jurisdiction over lands they have governed without interruption for centuries.

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* Pursuant to Rule 37.2, counsel of record for all parties received notice on or before August 2, 2010 of the States' intention to file this brief.

SUMMARY OF THE ARGUMENT

In *Sherrill*, this Court rejected the claim of the Oneida Indian Nation of New York ("OIN") to "present and future sovereign immunity from local taxation" on lands that the OIN had recently acquired in the open market within an "area that once composed [its] historic reservation." *Id.* at 214, 202. The Court held that laches, acquiescence and impossibility barred the Oneidas' long-delayed assertion of sovereignty because of the substantial disruption to state and local governance the claim would cause. *See id.* at 202-03, 221. Moreover, the Court explained, over the objection of Justice Stevens in dissent, that this equitable bar applied whether OIN was asserting sovereignty affirmatively in a declaratory judgment action or defensively in the suit by the city to evict the OIN for failure to pay property taxes. *Compare id.* at 214 n.7 (opinion of the Court) *and* 222 (Justice Souter concurring), *with* 225-26 (Justice Stevens dissenting).

Nevertheless, a panel of the Second Circuit has now held, without so much as mentioning the above statement in *Sherrill*, that this Court's earlier decisions in *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998), and *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991), compel the conclusion that "although the Counties may tax the property at issue here, *see City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), they may not foreclose on those properties because the tribe is immune from suit." Pet. App. 33a (Judges Cabranes and Hall concurring). Two members of the

three-judge panel, in an opinion curiously labeled a "concurring opinion," acknowledged that this result is "anomalous" in view of *Sherrill* and "defies common sense" but believed that it is compelled by this Court's earlier tribal sovereign immunity precedents, which they called upon this Court "to reconsider." *Id.* at 32a-33a.

The Second Circuit's decision should be reviewed by this Court. First, the holding below flies in the face of both the letter and the spirit of *Sherrill*. This Court has already held that the OIN is not immune from the city's eviction proceeding. *See* 544 U.S. at 214, n. 7 (opinion of the Court), 222 (Justice Souter concurring). In addition, tribal sovereign immunity is an attribute of tribal sovereignty generally, and thus, the distinction that the Second Circuit drew between tribal sovereign authority over land and tribal sovereign immunity is illusory. *See* Pet. App. 14a. In *Sherrill*, this Court used the terms "sovereign," "sovereignty" and "sovereign immunity" interchangeably. *See, e.g.*, 544 U.S. at 202, 213, 214. Moreover, by upholding the OIN's claim of immunity here, the Second Circuit effectively denied the State and local governments the power to enforce against the OIN the regulatory jurisdiction that this Court in *Sherrill* ruled that they, not the OIN, exercise over the OIN's recently acquired lands. *See* 544 U.S. at 220 (granting tax immunity would also imply immunity "from local zoning or other regulatory controls that protect all landowners in the area"). The lack of effective enforcement would create the very disruption of "the governance of central New York's counties and towns" that this Court in *Sherrill* sought to avert. *Id.* at 202, *see also* 219 ("disruptive practical consequences"),

220 n.13 ("[o]ther tribal entities have already sought to free historic reservation lands purchased in the open market from local regulatory controls").

Second, the decision is at odds with this Court's decision in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), approving the *in rem* foreclosure of taxable tribal real property. The Second Circuit mistakenly relied instead on this Court's decisions in *Potawatomi* and *Kiowa*, but those cases involved *in personam* jurisdiction and do not govern the foreclosure of taxable tribal land.

Third, as the Second Circuit recognized, because that court's holding is equally applicable to "land that was never part of a reservation," Pet. App. 32a (Judges Cabranes and Hall concurring), the resulting disruption of state and local governance is not limited to former Indian lands in central New York but threatens every community throughout the United States.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's Decision Conflicts with this Court's Decision in *Sherrill*.

This Court should grant the petition for certiorari to resolve the conflict between the Second Circuit's holding that the counties' tax enforcement proceedings are barred by tribal sovereign immunity and this Court's holding in *Sherrill* that the OIN is precluded by laches and other delay-based doctrines from asserting sovereignty regarding its recently acquired lands. *See* Sup. Ct. R. 10(c); *Potawatomi*, 498 U.S. at 509 (certiorari granted "to resolve an apparent conflict with this Court's precedents and to clarify the law of sovereign immunity with respect to the collection of sales taxes on Indian lands").

The conflict is direct and apparent. First, in *Sherrill*, this Court expressly concluded that the OIN was not immune from the city's tax enforcement proceedings. There, the OIN sued, among others, the City of Sherrill in federal court after the city initiated eviction proceedings against the OIN following the OIN's nonpayment of taxes. *See Sherrill*, 544 U.S. at 211; *see also Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*, 145 F. Supp. 2d 226, 236-40 (N.D.N.Y. 2001) (in *Sherrill*, the OIN sought to bar local governments from foreclosing or otherwise enforcing their real property taxes), *aff'd*, 337 F.3d 139 (2d Cir. 2003), *rev'd and remanded*, 544 U.S. 197 (2005). The OIN sought "declaratory and injunctive relief recognizing its present and future *sovereign immunity from local taxation* on parcels of land the [OIN] purchased in the open market." *Sherrill*, 544 U.S. at 214 (emphasis added).

This Court rejected the OIN's assertion of sovereign immunity from local taxation, holding that the OIN "cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue." *Id.* at 203; *see also id.* at 222 (Justice Souter concurring) (the OIN "is not now immune from the taxing authority of local government"). In particular, the Court held that the OIN could not invoke immunity to defend against the city's real property tax enforcement proceedings. In his dissent, Justice Stevens suggested that tribal immunity could be raised "as a *defense* against a state collection proceeding" and observed that *Sherrill* itself presented that very issue. *Id.* at 225. However, the Court's majority squarely rejected that argument:

> The dissent suggests that, compatibly with today's decision, the Tribe may assert tax immunity defensively in the eviction proceeding initiated by Sherrill. *Post*, at 225. *We disagree. The equitable cast of the relief sought remains the same whether asserted affirmatively or defensively.*

Id. at 214 n.7 (emphasis added); *see also id.* at 222 (Justice Souter concurring) (rejecting claim of tribal sovereignty, "whether affirmative or defensive"). Accordingly, in *Sherrill* this Court rejected the very claim of immunity from tax enforcement upheld below by the Second Circuit.

Second, the distinction that the Second Circuit drew between tribal sovereign authority over land and tribal sovereign immunity is untenable in the *Sherrill* context. The court found that the OIN had sovereign immunity

from tax enforcement although the OIN was barred from exercising sovereignty over the land. Pet. App. 14a-20a. But this Court drew no such distinction in *Sherrill*, repeatedly using the words "sovereign" and "sovereignty" in holding that the OIN's claim of "sovereign immunity from local taxation" was barred. 544 U.S. at 214; *see also id.* at 202, 203, 213, 214, 215 n.9, 216, 219, 220, 221 n.14. As the term implies, "sovereign immunity" is an attribute of sovereignty generally. *See Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 24-25, 30-31 (1st Cir. 2006) (en banc) ("tribal sovereign immunity is most accurately considered an incidence or subset of tribal sovereignty" and "[t]he Tribe has not explained how being subject to the *enforcement* of the State's cigarette tax scheme is an infringement on its retained sovereignty when being subject to the *requirements* of the scheme is not"). Indeed, this Court's decision in *Potawatomi* recognized that tribal sovereign immunity is part of the tribes' "inherent sovereign authority over their members and territories." *Potawatomi*, 498 U.S. at 509 (suits against Indian tribes "are *thus* barred by sovereign immunity" absent waiver or abrogation) (emphasis added). Thus, the sovereignty that *Sherrill* bars the OIN from exercising regarding these lands necessarily includes the assertion of sovereign immunity from foreclosure and other property tax enforcement proceedings.

Third, the Second Circuit's decision treats this Court's decision in *Sherrill* as a mere theoretical exercise that is devoid of any practical significance. *Sherrill* made clear that the disruption of the long established local governance that would result if the OIN were held to be immune from the counties' tax and regulatory jurisdiction justified the

Court's invocation of laches, acquiescence and impossibility. That reasoning is equally applicable to the OIN's assertion of sovereign immunity. If the State and the local governments are unable to enforce their tax and regulatory jurisdiction against the OIN, then as a practical matter the OIN cannot be compelled to pay the real property taxes that this Court held it owes or to comply with state and local land regulations.[1] Depriving the counties of their enforcement authority will inevitably result in the "disruptive practical consequences," including jurisdictional "checkerboard[ing]," that led this Court to reject the OIN's unilateral revival of sovereignty in the first place. *Sherrill*, 544 U.S. at 219; *see id.* at 220 and n. 13 (observing that OIN's claim would also immunize it "from local zoning or other regulatory controls that protect all landowners in the area"); *see also New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 298 (E.D.N.Y. 2007) (finding of immunity from enforcement would "completely undermine" *Sherrill*'s holding because the state and local governments could not use the courts to avoid the disruptive impact that the Court "clearly stated they

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[1] While the U.S. Department of the Interior decided to take into trust for the OIN approximately 13,000 of the 17,000 acres of land at issue here, and while the OIN claims to have secured the payment of back taxes on all of the land at issue, the Second Circuit correctly concluded that this case is not moot. *See* Pet. App. 12a-13a. The Second Circuit's decision will apply to the 4,000 acres of OIN land that were not taken into trust as well as to future land purchases by the OIN and other tribes. In addition, both the validity of the Interior Department's trust determination and the adequacy of the OIN's purported security have been challenged in the pending trust litigation. *See, e.g.*, *New York v. Salazar*, No. 6:08-cv-644, 2010 WL 2346317 (N.D.N.Y. June 9, 2010).

have the equitable right to prevent") (appeal pending); *Oneida Tribe of Indians of Wis. v. Village of Hobart, Wis.*, 542 F. Supp. 2d 908, 921 (E.D. Wis. 2008) (*Sherrill* permits forced sale of land for nonpayment of taxes). Therefore, contrary to the holding of the Second Circuit, the same equitable principles of laches, acquiescence and impossibility that barred the OIN's claim of sovereignty in *Sherrill* bar the OIN's similarly disruptive assertion of sovereign immunity here.

II. This Court Should Clarify That Tribal Sovereign Immunity Does Not Bar Foreclosure of Taxable Tribal Real Property.

This Court should also grant the petition for certiorari to clarify that its decision in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), rather than the Court's decisions in *Potawatomi* and *Kiowa*, govern foreclosure of taxable tribal real property. In *Yakima*, the Court permitted the *in rem* foreclosure of tribal land that was subject to local taxation without invoking tribal sovereign immunity. The Second Circuit, disregarding *Yakima*, concluded instead that *Potawatomi* and *Kiowa* compelled the conclusion that the OIN was immune from the counties' foreclosures. Pet. App. 14a-23a. But *Potawatomi* and *Kiowa* involved *in personam* jurisdiction and arose in circumstances very different from this case. This Court should clarify that tribal sovereign immunity does not extend to the *in rem* real property tax foreclosures involved here.

The clear import of this Court's decision in *Yakima* is that tribal sovereign immunity does not bar the

foreclosure of taxable tribal real property. In *Yakima*, the Court held that section 5 of the General Allotment Act permitted the county to impose an ad valorem tax on reservation land patented in fee pursuant to the Act. *See Yakima*, 502 U.S. at 270. The Court reasoned that, when section 5 rendered the allotted lands alienable and encumberable, "it also rendered them subject to assessment *and forced sale for taxes*." *Id.* at 263-64 (emphasis added). In so holding, the Court did not distinguish between "fee patented lands held by the Tribe or its members," although the county sought to foreclose on tribal as well as member-owned lands. *Id.* at 256. The Court noted that "[l]iability for the ad valorem tax flows exclusively from ownership of realty on the annual date of assessment" and "creates a burden on the property alone." *Id.* at 266. The Court also observed that unlike *in personam* jurisdiction, the "mere power to assess and collect a tax on certain real estate" is not significantly disruptive of tribal self-government. *Id.* at 265. *See also Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007) ("[a]s a threshold matter, property ownership is not an inherently sovereign function").

The Court's reasoning in *Yakima* is equally applicable here. The Court tied together taxability and tax enforcement—the alienability of the lands made them subject to *both* "assessment" and "forced sale for taxes." *Yakima*, at 263-64. In *Sherrill*, this Court determined that the OIN's parcels were subject to local real property taxation. Consequently, the OIN's parcels are subject to the same *in rem* remedies, including foreclosure, as were the tribal parcels in *Yakima*. Under New York law, the unpaid property taxes are liens upon

the OIN's parcels, and the proceedings to foreclose the tax liens are proceedings *in rem*. *See* N.Y. Real Prop. Tax Law §§ 902, 1120 (McKinney 2000).[2] Thus, under *Yakima* the counties' *in rem* foreclosures are not barred by tribal sovereign immunity.

The Second Circuit's reliance on *Potawatomi* and *Kiowa* was misplaced. Unlike the real property tax foreclosures here, *Potawatomi* and *Kiowa* were *in personam* actions against the tribes, rather than *in rem* proceedings against tribal property. In addition, sound policy reasons counsel against relying on those decisions in the foreclosure context. In *Potawatomi*, this Court held that Oklahoma could not sue the tribe to enforce the cigarette taxes that the tribe was required to collect on its reservation sales to non-tribal members. The Court relied on the availability of other enforcement options regarding cigarette taxes. *See Potawatomi*, 498 U.S. at 514 (noting that the State, although barred from suing the tribe to collect its cigarette taxes, could in the alternative sue tribal officers, enforce against wholesalers, enter agreements with the tribes or seek relief from Congress). The Second Circuit stated that similarly, an alternative remedy was available here, because tribal officers "remain susceptible to suits for damages and injunctive relief." Pet. App. 23a.

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[2] Oneida County follows an *in rem* process, which is described in the district court's decision below. *See* Pet. App. 37a-39a; *see also* Petition for Certiorari ("Pet.") at 6, n.4.

The Second Circuit's reliance on *Potawatomi*'s list of alternative cigarette tax enforcement strategies does not support a finding of immunity here because there is no meaningful real property tax enforcement alternative to a foreclosure action. The action to foreclose a lien for unpaid real property taxes provides a high probability of prompt payment, and thus foreclosure is a venerable and universal tax collection mechanism. In contrast, the Second Circuit's suggested alternative involves uncertainty and delay. *See* Pet. at 14, n. 8.

Nor did *Kiowa's* holding disturb the Court's earlier holding in *Yakima*. *Kiowa* involved a private lender's *in personam* action against the tribe on a promissory note — a garden-variety commercial loan transaction. Private parties that choose to enter into commercial relationships with tribes can negotiate waivers of tribal sovereign immunity, and the waivers will be enforced. *See C & L Enter., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001) (tribal contract waived sovereign immunity).

In the present case, there is nothing voluntary about the counties' relationship with the OIN. When the OIN bought the properties in the open market, it became a real property owner liable, *Sherrill* holds, for the payment of real property taxes to the counties. However, unlike a private party contemplating a commercial relationship with the OIN, the counties had no power to walk away from their new relationship with the OIN, nor could they require that the OIN waive immunity from suit before buying the properties. Nor are the counties akin to involuntary tort creditors with *in personam* claims. Under these circumstances, *Kiowa*

should not be extended to bar *in rem* foreclosure proceedings brought by the local governments that this Court held to be sovereign over these lands. The Court should reject the Second Circuit's broad expansion of tribal sovereign immunity and clarify that *Yakima* and *Sherrill*, not *Kiowa* and *Potawatomi*, govern this case.

III. The Second Circuit's Decision Would Bar Foreclosure Of Any Real Property Owned By An Indian Tribe Anywhere.

Finally, as a majority of the Second Circuit panel recognized, that court's holding extends tribal sovereign immunity to bar tax foreclosure even as to "land that was never part of a reservation." Pet. App. 32a (Judges Cabranes and Hall concurring). Under the court's analysis, the OIN, or any other Indian tribe, could buy real property anywhere in the United States, *e.g.*, the Empire State Building, refuse to pay real property taxes, and invoke sovereign immunity as an absolute defense to the resulting foreclosure action. The Second Circuit's holding does not depend on the tribal history or legal status of the land but follows solely from the fact of tribal fee ownership today. This ruling threatens to extend the potential disruption of state and local governance from two counties in central New York to every community in the United States. This Court should grant the petition to clarify that its tribal sovereign immunity holdings do not support this dramatic expansion of tribal power at the expense of all the States and their local subdivisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

MADISON COUNTY, NEW YORK, ET AL.,
PETITIONERS,

v.

ONEIDA INDIAN NATION OF NEW YORK,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* TOWN OF LENOX, NEW YORK, IN SUPPORT OF PETITIONERS MADISON COUNTY AND ONEIDA COUNTY, NEW YORK

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INTEREST OF *AMICUS CURIAE*[1]

The Town of Lenox is located in Madison County, New York, and lies within the footprint of the Oneida land claim area.[2] As in other neighboring communities, the Oneida Indian Nation of New York ["OIN"] has purchased a checkerboard of desirable lands within Lenox, refused to pay its property taxes, and refused to comply with numerous zoning, land use, health and safety, and other regulations.

This Court's landmark decision in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) — in which Lenox participated as an *amicus*[3] — was supposed to have resolved this sovereignty dispute. *Sherrill* rejected OIN's theory that "sovereign dominion" had somehow been "unified" with title when the tribe reacquired the parcels. *Id.* at 213-14; *see id.* at 221 (rejecting "the piecemeal shift in governance this suit seeks unilaterally to initiate"). OIN cannot "unilaterally revive its ancient sovereignty, in whole or in part," over aboriginal tribal lands that it reacquires "through open-market purchases from current titleholders." *Id.* at 203, 220-21 (citations omitted). "Sovereign dominion"

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[1] This brief is presented pursuant to Sup. Ct. R. 37.4; the Town's authorized law officer appears as co-counsel. Pursuant to Sup. Ct. R. 37.2, counsel of record for all parties were notified on August 2, 2010 of the Town's intention to file this brief.

[2] Lenox was founded in 1809, occupies 36.4 square miles, and had a population of 8,665 as of the 2000 census.

[3] This Court drew extensively on arguments developed in Lenox's brief — including the federal government's shared culpability for the Oneida's historic losses and the application of the doctrines of "impossibility" and "acquiescence" in determining present-day sovereignty. *Compare* 544 U.S. at 205-08, 214 & n.8, 218-20 *with* Brief of Amici Curiae Town of Lenox et al. in Support of Petitioner City of Sherrill, at 4, 7-10, 12, 19-30, *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) (No. 03-855), 2004 WL 1835370.

and "authority" therefore remain vested with New York and its county and local governments. *Id.* at 213, 221.

For over five years, however, OIN has refused to comply with *Sherrill*'s mandate. It continues to flout the property tax obligations that *Sherrill* upheld, thereby continuing to deny critically needed revenues to local governments and school districts. OIN also continues to refuse to submit to a variety of local zoning, land use, and health and safety laws in Lenox and elsewhere that, under *Sherrill*, govern OIN's newly purchased non-trust lands. Many of these parcels are surrounded by non-Indian properties and occupy strategic locations throughout the land claim area. OIN has cherry picked these lands — including gas stations, convenience stores, shopping centers, marinas, prime highway billboard locations, manufacturing facilities, and other key commercial properties — and then unilaterally declared them off-limits to state and local taxation, zoning and land use, and other regulatory authority. Thus the *very* chaos and uncertainty, "disruptive practical consequences," and "serious burdens" on local governments that this Court's decision in *Sherrill* was intended to avoid have only grown worse in recent years. *Id.* at 219-20. Lenox cannot effectively carry out its home rule powers and statutory mandates if *Sherrill* is, in the Second Circuit's words, "meaningless" and "eviscerate[d]" by common law tribal sovereign immunity. Pet. App. 21a (quoting Counties' brief).

SUMMARY OF THE ARGUMENT

> "Land is either exempt from state law, or it is not. . . . Unless a state or local government is able to foreclose on Indian property for nonpayment of taxes, the authority to tax such property is meaningless, and the Court's analysis in *Yakima*, *Cass County* and *Sherrill* amounts to nothing more than an elaborate academic parlor game." *Oneida Tribe of Indians of Wis. v. Vill. of Hobart*, 542 F. Supp. 2d 908, 921 (E.D. Wis. 2008).

The Counties' petition ably demonstrates the many ways in which the decision below is in irreconcilable conflict with *Sherrill* and the bedrock distinction between *in personam* and *in rem* jurisdiction drawn in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 263-65 (1992). This brief will avoid repeating those arguments. Rather, *amicus* demonstrates that the decision below *also* is in fundamental conflict with this Court's tribal sovereign immunity jurisprudence, with this Court's treatment of foreign and state sovereigns in analogous circumstances, and with decisions by state courts of last resort on the identical question presented here — whether there is an *in rem* exception to tribal sovereign immunity for non-trust lands purchased by a tribe outside the territorial scope of its sovereignty, jurisdiction, and regulatory authority.[4]

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[4] The second Question Presented also warrants plenary review. Continuing uncertainty over the post-*Sherrill* rules regarding reservation disestablishment and diminishment has led to decisions like *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614, 638-43, 930 N.E.2d 233 (2010), in which New York's highest court recently concluded that, under federal law,

This Court developed the doctrine of tribal sovereign immunity in order to extend to Native American tribes "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). But tribes do not retain the full sovereignty of foreign nations or the fifty States; they are "domestic dependent nations" that are "completely under the sovereignty and dominion of the United States." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *see also United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character."). The "limited character" of tribal sovereignty necessarily restricts the scope of tribal sovereign *immunity* as well. *See Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890-91 (1986) ("Of course, because of the peculiar 'quasi-sovereign' status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy.").

Notwithstanding the "unique and limited character" of tribal sovereignty and its corollary, tribal sovereign immunity, the Second Circuit's decision below allows OIN to do what no foreign nation or domestic State could get away with: purchase lands in its private capacity outside its "sovereign dominion," refuse to comply with valid tax laws governing those lands and Supreme Court judgments ordering that the taxes be paid, then avoid foreclosure on the tax-delinquent lands by raising its sovereign immunity. This Court repeatedly has emphasized that Native American tribes do not have "supersovereign authority to interfere with another jurisdiction's sovereign right[s] . . . within that jurisdiction's limits." *Okla. Tax Comm'n v. Chickasaw*

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the Cayuga Nation's 18th-century reservation remains intact even though the tribe has held *no* trust lands *anywhere* within that 64,000-acre area since the Jefferson Administration (1807).

Nation, 515 U.S. 450, 466 (1995); *see also Rice v. Rehner*, 463 U.S. 713, 734 (1983) (tribal members are not "super citizens"). The decision below flouts these principles by recognizing a tribal "supersovereign" immunity not enjoyed by any foreign or state sovereign.

First, it has been blackletter federal common law for nearly 200 years that a foreign country does not have immunity with respect to land it acquires in this country, including immunity from execution (diplomatic and consular property excepted). *See The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 145 (1812). The so-called "immovable property" exception to foreign sovereign immunity is reflected in the federal common law, followed by the State Department, embraced in international agreements, and codified in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1605(a)(4), 1610(a)(4)(B). The decision below gives a *domestic dependent* nation immunity exceeding that of a *foreign* nation.

Second, the decision below conflicts with this Court's *state* sovereign immunity decisions, which also recognize an "immovable property" exception to the rules of immunity. *See Georgia v. City of Chattanooga*, 264 U.S. 472, 480-82 (1924) ("Land acquired by one state in another state is held subject to the laws of the latter and to all the incidents of private ownership. . . . The power of the [sovereign] to condemn does not depend upon the consent or suability of the [other sovereign]."). Here again, the decision below confers "supersovereign authority" on a tribe to interfere with the taxation, zoning, land use, and other regulatory authority of another sovereign with respect to lands located in *that* sovereign's territory — a power denied to other sovereigns.

Third, the decision below squarely conflicts with the decisions of at least two state courts of last resort on the first

Question Presented. *See, e.g., Cass Cnty. Joint Water Res. Dist. v. 1.43 Acres of Land*, 2002 ND 83, ¶ 21, 643 N.W.2d 685, 697 (2002); *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash. 2d 862, 873, 929 P.2d 379, 388 (1996). The conflict could not be more stark. Either there is an *in rem* exception to the doctrine of tribal sovereign immunity (as with foreign and state immunity) or there is not and tribes instead can play by "supersovereign" rules.

Finally, contrary to the Second Circuit's decision, neither *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), nor *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), support — let alone compel — the outcome below. Neither involved an *in rem* action against immovable property located *outside* the tribe's "sovereign dominion"; neither implicated *another* sovereign's jurisdiction and regulatory authority over lands within *its* "sovereign dominion"; both left the non-tribal parties with meaningful alternative remedies. Indeed, while holding that Oklahoma could not recover money damages from a tribal treasury, this Court in *Potawatomi* expressly authorized the off-reservation *in rem* seizure of tribal property (there, cigarettes) en route to the reservation for resale to nonmembers. *See* 498 U.S. at 514 ("States may of course" engage in such seizures). If tribal sovereign immunity does not prevent *in rem* actions against *movable* tribal property, it is difficult to fathom why it should prevent *in rem* actions against *immovable* tribal non-trust property located outside the tribe's "sovereign dominion," especially given the signal importance of a sovereign's control over lands within its jurisdiction.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S TREATMENT OF FOREIGN SOVEREIGN IMMUNITY AND IMPERMISSIBLY GIVES "SUPERSOVEREIGN AUTHORITY" TO TRIBES.

Under "primeval" principles of federal common law and international practice, the People's Republic of China could not purchase property in Madison County, refuse to pay its property taxes, and then defeat the County's action to foreclose on the tax-delinquent property by invoking its foreign sovereign immunity. *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (CADC 1984) (Scalia, J.). That should be the end of the analysis here. This Court repeatedly has looked to the rules of *foreign* sovereign immunity as "instructive" in defining the extent of *tribal* sovereign immunity. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 421 n.3 (2001); *Kiowa*, 523 U.S. at 759; *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560-61 (1832) (defining tribal sovereignty in reference to the "settled doctrine of the law of nations"). Indeed, the immunity of a *foreign* nation necessarily marks the outer boundary of any legitimate claim of immunity by a *domestic dependent* nation; far from being "supersovereign[s]" with *greater* immunity than foreign nations, tribes enjoy less sovereignty and fewer immunities given their "dependent" status. *Chickasaw Nation*, 515 U.S. at 466; *see also Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 165 (1980) (Brennan, J., concurring in part and dissenting in part) ("While they are sovereign for some purposes, it is now clear

that Indian reservations do not partake of the full territorial sovereignty of States or foreign countries.").[5]

The federal common law of *foreign* sovereign immunity, which "long predated" the enactment of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1602 *et seq.*, is that, "when owning property here, a foreign state must follow the same rules as everyone else." *City of New York v. Permanent Mission of India to the UN*, 446 F.3d 365, 374 (CA2 2006), *aff'd*, 551 U.S. 193 (2007). This Court first embraced that rule nearly two centuries ago, observing that "[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction [of the foreign country]; he may be considered as so far laying down the prince, and assuming the character of a private individual." *Schooner Exch.*, 11 U.S. (7 Cranch) at 145. The reason for exempting "immovable property" within U.S. jurisdiction from the scope of foreign sovereign immunity is "self evident": "A territorial sovereign has a primeval interest in resolving all disputes over use or right to use of real property within its own domain." *Reclamantes*, 735 F.2d at 1521.[6]

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[5] *See generally Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2719 (2008); *Nevada v. Hicks*, 533 U.S. 353, 361 (2001); *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 72 (1962).

[6] "As romantically expressed in an early treatise: 'A sovereignty cannot safely permit the title to its land to be determined by a foreign power. Each state has its fundamental policy as to the tenure of land; a policy wrought up in its history, familiar to its population, incorporated with its institutions, suitable to its soil.'" *Reclamantes*, 735 F.2d at 1521 (quoting 1 F. Wharton, *Conflict of Laws* § 278 at 636 (3d ed. 1905)). These are the same considerations that drove the sovereignty determination in *Sherrill*. *See* 544 U.S. at 202, 211, 215-16, 219-20 ("character of the area," history of "regulatory authority" and "jurisdiction,"

This "immovable property" exception to foreign sovereign immunity has continued to be followed under federal common law, by the Department of State, and in international agreements. As embodied in the *Restatement (Second) of Foreign Relations Law* § 68(b) (1965), the blackletter principle is that "[t]he immunity of a foreign state . . . does not extend to . . . an action to obtain possession of or establish a property interest in immovable property located in the territory of the State exercising jurisdiction." This includes *in rem* actions against "real property located in the territory of [the] state exercising jurisdiction." *Id.* cmt. d.[7] *See also Restatement (Third) of Foreign Relations Law* §§ 455(1)(c), 460(2)(e) (1987) (readopting "immovable property" exception, including with respect to execution against such property); United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. Doc. A/RES/59/38, art. 13(a) (foreign State not entitled to immunity "in a proceeding which relates to the determination of . . . any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum"); Letter from Jack B. Tate of May 19, 1952, 26 Dep't of State Bull. 984 (1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976) (despite conflicts between the "classical or absolute theory" and the "newer or restrictive theory" of foreign sovereign immunity, "[t]here is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be

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current demographics, "justifiable expectations" of current residents, and potentially "disruptive practical consequences" of accentuating "checkerboard" allocation of sovereignty).

[7] The *Restatement (Second)* offers this example: "State A brings proceedings in eminent domain in its courts to condemn real property owned by state B in A. B is not entitled to immunity from such a suit." Section 68(b) cmt. d, illus. 6.

claimed or granted in actions with respect to real property (diplomatic and perhaps consular property exempted)[.]").[8]

Congress codified the "immovable property" exception in the FSIA, which provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which . . . rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). Moreover, such property "shall not be immune from . . . execution" if "the execution relates to a judgment establishing rights in property . . . which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission[.]" *Id.* § 1610(a)(4)(B). These provisions were enacted to codify "the pre-existing real property exception to sovereign immunity recognized by international practice." *Reclamantes*, 735 F.2d at 1521; *see also Permanent Mission of India v. City of New York*, 551 U.S. 193, 199-201 (2007); H.R. Rep. No. 94-1487, at 20 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618-19.[9]

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[8] OIN argued below that traditional rules do not allow *execution* against such property. *See* Brief for Appellee Oneida Nation of New York at 37-39 & n.9, *Oneida Indian Nation of N.Y. v. Madison Cnty.*, 605 F.3d 149 (CA2 2010) (No. 05-6408(L)), 2007 WL 6432641 (relying on the "General Rule" set forth in *Restatement (Second)* § 65 & cmt. d). But that "General Rule" is expressly made subject to the "except[ion]" in § 68(b) for "an action to obtain possession of . . . immovable property," which clearly *is* subject to *in rem* execution. *See* n.7 *supra*. Moreover, the pre-FSIA cases cited by OIN (*see* Br. at 39 n.9) all dealt with diplomatic and consular property, which has long been recognized as immune from execution and is not involved here. *See* n.9 *infra*.

[9] Because *Permanent Mission of India* involved tax-delinquent property that was being used at least in part "for

The Second Circuit's decision below conflicts with the "immovable property" exception that applies even to claims of sovereign immunity by foreign nations. Just as a foreign prince "lay[s] down the prince" when purchasing land in the United States, *Schooner Exch.*, 11 U.S. (7 Cranch) at 145, so OIN must "lay down" its claim to "supersovereign authority" over lands it purchases outside the territorial scope of its "sovereign dominion" as demarcated in *Sherrill*. *See* 544 U.S. at 213.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S TREATMENT OF STATE SOVEREIGN IMMUNITY.

Just as China could not invoke the broad sovereign immunity that OIN asserts, the Commonwealth of Pennsylvania could not buy private property in Madison County, refuse to pay its property taxes, and then avoid foreclosure by invoking principles of comity or sovereign immunity. This Court emphasized in *Sherrill* that cases construing the limits of *state* sovereignty "provide a helpful point of reference" in determining the scope of *tribal* sovereignty. 544 U.S. at 218. For example, the Court relied heavily on "[t]he acquiescence doctrine" developed in its "original-jurisdiction state-sovereignty cases" in fashioning a parallel restriction on tribal sovereignty under "standards of federal Indian law and federal equity practice." *Id.* at 214, 218.

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purposes of maintaining a diplomatic or consular mission," 28 U.S.C. § 1610(a)(4)(B), it was conceded that the usual remedies of foreclosure and execution were unavailable, and that the City of New York had to recover its back taxes through special alternative statutory procedures. *See* 551 U.S. at 196 n.1; 446 F.3d at 368, 371, 373-74. There is no similar exception to the rules of tribal sovereign immunity, and OIN in any event owns the lands in issue for a variety of commercial purposes, not for use as "a diplomatic or consular mission" to New York State or its local governments.

There is a similarly strong "point of reference" here. This Court long ago held that the "immovable property" exception also applies to a State's sovereign immunity from unconsented suit. In *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924), the State of Georgia purchased eleven acres on the open market in Chattanooga, Tennessee (which abuts Georgia's border) for use as a railroad yard in support of Georgia's state railway operations. Later, Chattanooga sought to condemn Georgia's property as part of a redevelopment project, and Georgia brought an original action in this Court insisting that the City could not touch the property because of Georgia's sovereign immunity — precisely the argument OIN makes here. This Court unanimously rejected that claim:

> "The power of Tennessee, or of Chattanooga as its grantee, to take land for a street, is not impaired by the fact that a sister state owns the land . . . . *Land acquired by one state in another state is held subject to the laws of the latter and to all the incidents of private ownership.* . . . The sovereignty of Georgia was not extended into Tennessee. Its enterprise in Tennessee is a private undertaking. It occupies the same position there as does a private corporation authorized to own and operate a railroad, and, as to that property, it cannot claim sovereign privilege or immunity. *Undoubtedly Tennessee has power to open roads and streets across the railroad land owned by Georgia.* [Georgia's] property [in Tennessee] is as liable to condemnation as that of others, and it has, and is limited to, the same remedies as are other owners of like property in Tennessee. *The power of the city to condemn does not depend upon the consent or suability of the owner.*"

> *Id.* at 479-82 (citations and paragraph breaks omitted, emphasis added).

Georgia v. Chattanooga is settled law. As the Supreme Court of Minnesota has observed, it is "elementary" that "a state acquiring ownership of property in another state does not thereby project its sovereignty into the state where the property is situated. The public and sovereign character of the state owning property in another state ceases at the state line[.]" *State v. City of Hudson*, 231 Minn. 127, 130, 42 N.W.2d 546, 548 (1950) (*re* portion of bridge owned by Wisconsin city that was located in Minnesota). The Supreme Court of Illinois has added that, "[i]f it were otherwise, the acquisition of land in Illinois by another State would effect a separate island of sovereignty within our boundaries. Such possibility can find no support in the law or reason." *People ex rel. Hoagland v. Streeper*, 12 Ill. 2d 204, 213, 145 N.E.2d 625, 630 (1957) (*re* court-imposed receivership over portion of bridge owned by Missouri county that was located in Illinois).[10]

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[10] *See also City of Augusta v. Timmerman*, 233 F. 216, 217, 219 (CA4 1916) (*re* forced tax sale of South Carolina land owned by Georgia; recognizing Georgia's immunity claim would be "anomalous and contrary to legislative history and governmental policy"); *State ex rel. Taggart v. Holcomb*, 85 Kan. 178, 184-85, 116 P. 251, 253 (1911) (Missouri city operating waterworks plant in Kansas "has no other or greater rights than a private corporation engaged in the same business. It is part of a sovereignty, it is true; but its powers cannot be exercised in Kansas. . . . [A] state of the Union is only sovereign in its own territory."); *City of Cincinnati v. Commonwealth ex rel. Reeves*, 292 Ky. 597, 167 S.W.2d 709, 714 (1942) (*re* railroad property owned by Ohio city but located in other States; "[a] municipality operating beyond the boundaries of the sovereignty creating it, is universally regarded as a private corporation with respect to such operations.").

Likewise, because States are not allowed to create "separate island[s] of sovereignty" by purchasing land within another sovereign's jurisdiction, *id.* at 213, 145 N.E.2d at 630, neither may tribes. Indeed, this Court has emphasized that tribal sovereignty immunity "[o]f course" is *narrower* than, "not congruent with," state sovereign immunity. *Three Affiliated Tribes*, 476 U.S. at 890-91. The decision below turns this lack of "congruence" on its head.[11]

III. THE DECISION BELOW CONFLICTS WITH DECISIONS BY STATE COURTS OF LAST RESORT ON THE SAME IMPORTANT FEDERAL QUESTION.

The Second Circuit's decision below also conflicts with decisions by state courts of last resort on the identical question presented here — whether non-trust land purchased by a tribe outside its sovereign dominion is immune from the *in rem* jurisdiction of the state and local governments where the land is located. *See* Sup. Ct. R. 10(a).

The Supreme Court of North Dakota, for example, has held that tribal sovereign immunity does not extend to *in rem* actions against such tribally purchased land, which "is essentially private land" and subject to the State's "territorial

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[11] OIN argued below that *Georgia v. Chattanooga* was an "unusual" case, and in any event irrelevant because States do not have Eleventh Amendment immunity from suit in the courts of other States. *Brief for Appellee*, *supra* n.8, at 36 n.8 (citing *Nevada v. Hall*, 440 U.S. 410, 426 n.29 (1979)). But the challenges presented by one sovereign holding property in another's dominion are hardly "unusual." Moreover, this Court framed its decision in *Georgia v. Chattanooga* as an *exception* to rules of "sovereign privilege or immunity" from suit. 264 U.S. at 480-81. Whether state sovereign immunity rules are based on the Constitution, common law, or comity, what is relevant here is that OIN is asking for a "supersovereign" immunity that is not recognized for either state or foreign sovereigns.

jurisdiction," including its condemnation authority. *Cass Cnty. Joint Water Res. Dist. v. 1.43 Acres of Land*, 2002 ND 83 ¶ 21, 643 N.W.2d 685, 694 (2002). At issue in *Cass County* was a 1.43 acre parcel of land that lay within the area that would be flooded by a proposed dam. An opponent of the proposed dam sold the parcel to the Turtle Mountain Band of Chippewa Indians by warranty deed for $500; the land allegedly had been aboriginally occupied by the Band's ancestors and "contain[ed] a culturally significant village site and burial site." *Id.* ¶¶ 2-4, 643 N.W.2d at 688. The Band claimed that that its newly acquired parcel could not be condemned because, among other reasons, of its "tribal sovereign immunity" under *Kiowa*. *See id.* ¶ 12, 643 N.W.2d at 690-91.

North Dakota's highest court unanimously rejected the tribe's claim and held that tribal sovereign immunity does not bar a "purely in rem action against land held by the Tribe in fee" that is "not held in trust by, or otherwise under the superintendence of, the federal government." *Id.* ¶¶ 4, 12, 643 N.W.2d at 688, 691. The court relied heavily on *County of Yakima* and *Georgia v. Chattanooga* in emphasizing the fundamental distinctions between *in personam* jurisdiction — as to which sovereign immunity applies — and *in rem* jurisdiction over property held outside the sovereign's domain — as to which sovereign immunity does not attach. *See id.* ¶¶ 13-15, 19-20, 643 N.W.2d at 691-94. "Under these circumstances, the State may exercise territorial jurisdiction over the [tribally purchased] land, including an in rem condemnation action, and the Tribe's sovereign immunity is not implicated." *Id.* ¶ 21, 643 N.W.2d at 694. A contrary rule "would have far-reaching effects on the eminent domain authority of states and all other political subdivisions. Indian tribes would effectively acquire veto power over any public works project attempted by any state or local government merely by purchasing a small tract of land within the project," and "all public works projects

[would] be subject to uncertainty." *Id.* ¶¶ 24-25, 643 N.W.2d at 694-95.[12]

The Supreme Court of Washington reached a similar conclusion in *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash. 2d 862, 929 P.2d 379 (1996). There, a lumber company brought an action to partition and quiet title to fee-patented private lands within the Quinault Indian Reservation. A month later, the owners of an undivided one-sixth interest in the lands sold their interest to the Quinault Indian Nation, which was seeking to preserve its "tribal integrity and land base." *Id.* at 878, 929 P.2d at 387. The Nation then moved to dismiss based on its sovereign immunity.

The Washington high court rejected this defense based on the distinction between *in rem* jurisdiction over property that has passed out of tribal sovereignty and *in personam* jurisdiction over the tribe itself or lands subject to tribal sovereignty. Drawing heavily on *County of Yakima*, the court explained that "[t]he subsequent sale of an interest in the property to an entity enjoying sovereign immunity (Quinault Nation) is of no consequence in this case because the trial court's assertion of jurisdiction is not over the entity *in personam*, but over the property or the 'res' *in rem*." *Id.* at 873, 929 P.2d at 385.

The Second Circuit's approach to tribal sovereign immunity is fundamentally at odds with these decisions recognizing the distinction between *in personam* and *in rem* jurisdiction. Indeed, despite extensive briefing and argument, that fundamental distinction was not even

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[12] Although *Cass County* dealt with a tribe's purchase of land outside its historic reservation boundaries, *Sherrill* and other recent decisions demonstrate that the governing principle also applies to former tribal lands *within* a tribe's historic reservation that are repurchased by the tribe on the open market.

acknowledged by the decision below; the words "*in rem*" do not even appear in the panel or concurring opinions.[13]

IV. THE DECISION BELOW DOES NOT FOLLOW FROM, BUT CONFLICTS WITH, *KIOWA*, *POTAWATOMI*, AND THIS COURT'S OTHER TRIBAL SOVEREIGN IMMUNITY DECISIONS.

The Second Circuit felt constrained to recognize tribal sovereign immunity, even with respect to *in rem* actions against non-trust lands outside OIN's "sovereign dominion," pursuant to this Court's decisions in *Kiowa* and *Potawatomi*. Pet. App. 16a-23a; *see id.* 33a (Cabranes, J., concurring). But those decisions merely reaffirmed and applied this Court's prior decisions extending the "traditional" federal common law immunity of "*dominant sovereignties*" like foreign nations and States to "*domestic dependent*" tribal sovereigns as well. *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) (emphasis added); *see also Santa Clara*, 436 U.S. at 58; *Turner v. United States*, 248 U.S. 354, 357 (1919) (tribes should be treated "[l]ike other governments"). Nothing in *Kiowa*, *Potawatomi*, or this Court's earlier decisions suggests that the immunity of tribes from suit is even *greater* than that enjoyed by foreign or state sovereigns. Indeed, *Kiowa* reiterated that "the problems of sovereign immunity for foreign countries" are "instructive" in defining the scope of tribal sovereign immunity. 523 U.S. at 759.

Kiowa and *Potawatomi*, moreover, did not implicate another sovereign's *in rem* jurisdiction over lands within its

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[13] The panel opinion cited just once to *County of Yakima*, and only for the general proposition that, "[a]bsent cession of jurisdiction or other federal statutes permitting it, . . . a State is without power to tax reservation lands and reservation Indians." Pet. App. 15a. Under *Sherrill*, of course, that general principle does not apply to the lands in issue here.

own "sovereign dominion," and left the aggrieved parties with meaningful alternatives. *Kiowa* dealt with tribal immunity from private contract claims — claims that implicate none of the state and local sovereignty concerns presented here, and that are subject to bargaining and adjustment by the contracting parties. *See C & L Enters.*, 532 U.S. at 418-23. And *Potawatomi* merely barred claims for money damages against tribal treasuries, while emphasizing the availability of numerous "adequate alternatives" to such damage claims. 498 U.S. at 514. Although sovereign immunity prevented the State from pursuing "the *most* efficient remedy," there were a variety of alternative claims and enforcement actions that this Court believed could "produce the revenues to which [the States] are entitled." *Id.* (emphasis added). It is uncertain at best whether there are any such "adequate alternatives" here.

Indeed, *Potawatomi* instructed that States may pursue off-reservation *in rem* remedies against tribally owned property, emphasizing that States may "*of course*" enforce their cigarette tax laws by "seizing unstamped cigarettes off the reservation" that had been purchased by tribally owned retailers and were on their way to reservation outlets. *Id.* (emphasis added). This Court pointed to its earlier decision in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161-62 (1980), which also upheld seizures of "cigarettes in transit" where the affected tribes "have refused to fulfill collection and remittance obligations which the State has validly imposed. . . . By seizing cigarettes en route to the reservation, the State polices against wholesale evasion of its own valid taxes *without unnecessarily intruding on core tribal interests*." *Id.* at 162 (emphasis added, citations omitted).[14]

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[14] In both *Colville* and *Potawatomi*, the tribal retailers whose cigarettes were seized by the State were owned and operated by

Potawatomi and *Colville* expressly authorize state and local governments to take *in rem* action against tribally owned *movable* property. *See Keweenaw Bay Indian Community v. Rising*, 477 F.3d 881, 894-95 (CA6 2007) ("[W]hether or not the litigants in *Citizen Band* and *Colville* expressly argued that sovereign immunity prevented the seizures, the Court was well aware of the issue of tribal sovereign immunity when it approved the seizures in question. . . . [T]he Supreme Court has clearly endorsed state seizures as a remedy where sovereign immunity prevents in-court remedies.") (citations omitted). If tribally owned *movable* property is not immune from *in rem* action outside the tribe's sovereign dominion, surely tribally owned *immovable* property is not immune from such action — particularly given the unique concerns for sovereignty, jurisdiction, and regulatory authority implicated by one sovereign's ownership of immovable property in another sovereign's dominion. *See* Points I-III *supra*.[15]

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the tribes themselves, and thus shielded by tribal sovereign immunity. *See Colville*, 447 U.S. at 144-45; *Potawatomi*, 498 U.S. at 507. Curiously, although the Second Circuit quoted at length from the discussion of "adequate alternatives" in *Potawatomi*, it omitted the one sentence that discussed the alternative of "seizing unstamped cigarettes off the reservation" and the citation to *Colville* supporting such *in rem* seizures. *Compare* Pet. App. 22a-23a *with* 498 U.S. at 514.

[15] The United States argued as *amicus* below that "the distinction between *in personam* and *in rem* jurisdiction is meaningless with regard to sovereign immunity." Brief of United States as Amicus Curiae in Support of Appellee, at 9-10 & n.4, *Oneida Indian Nation of N.Y. v. Madison Cnty.*, 605 F.3d 149 (CA2 2010) (No. 05-6408(L)), 2008 WL 6086315. But the cases cited by the United States for this proposition (*see id.* at 9-11) are readily distinguishable. Most involved suits against federal property, which obviously is not subject to the "immovable property" exception because it is located *within* the owning

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OIN continues to refuse to abide by this Court's central holding in *Sherrill* — that the non-trust lands it buys on the open market are subject to state and local tax, zoning, and other regulatory authority. This of course is not the first time a disappointed litigant has refused to comply with a judgment of this Court. But as this Court has emphasized, the "obedience" by all parties to this Court's decisions is "indispensable for the protection of the freedom guaranteed by our fundamental charter for all of us." *Cooper v. Aaron*, 358 U.S. 1, 19-20 (1958). OIN's sovereign immunity defense is defined by, and subject to, "standards of federal Indian law and federal equity practice." *Sherrill*, 544 U.S. at 214. There is nothing in those standards that supports OIN's studied refusal to obey this Court's judgments, or its claim of a tribal "supersovereign" immunity exceeding that of any foreign or state sovereign. It is time for OIN to "lay[] down the prince." *Schooner Exch.*, 11 U.S. (7 Cranch) at 145.

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sovereign's jurisdiction. That the federal government's sovereign immunity prevents suit against its property within its "sovereign dominion" says *nothing* about a tribe's immunity with respect to property it owns *outside* its dominion. The U.S. brief also relied on *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997), which held that, absent a State's consent, *Ex parte Young* cannot be used to litigate title to the beds of navigable waters inside the State's boundaries because, under the Equal Footing Doctrine, those beds presumptively are state property under state dominion (and thus subject to state sovereign immunity). That again is readily distinguishable from property owned by one government that is located in *another* government's "sovereign dominion."

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

MADISON COUNTY AND ONEIDA COUNTY, NEW YORK,
PETITIONERS,

v.

ONEIDA INDIAN NATION OF NEW YORK,
RESPONDENT,

STOCKBRIDGE-MUNSEE COMMUNITY,
BAND OF MOHICAN INDIANS,
PUTATIVE INTERVENOR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* TOWN OF VERONA AND TOWN OF VERNON, NEW YORK IN SUPPORT OF PETITIONERS MADISON COUNTY AND ONEIDA COUNTY, NEW YORK

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PRELIMINARY STATEMENT

The Towns of Verona and Vernon, New York (the "Towns"), respectfully submit this *amicus curiae* brief in support of the Petition for a Writ of Certiorari to the United States Second Circuit Court of Appeals submitted by the Counties of Madison and Oneida, New York, with respect to *Oneida Indian Nation of New York v. Madison County & Oneida County, New York*, 605 F.3d 149 (2d Cir. 2010) ("Pet. App.").[1]

INTERESTS OF AMICI

In *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 (2005), this Court held that the Oneida Indian Nation of New York ("OIN"), the Indian tribe at issue here, could not through open-market purchases of land revive its former sovereignty over such land so as to exempt it from the payment of *ad valorem* property taxes. In part, the Court premised this conclusion on the disruptive practical consequences to the governance of central New York's counties and towns that would result from the OIN's unilateral reestablishment of sovereign control. In view of those consequences, this Court held, "standards of federal Indian law and federal equity practice" precluded the OIN from rekindling "embers of sovereignty that long ago grew cold." *Id.* at 214.

In recent years, the OIN has acquired fee title to over 17,000 acres of land scattered over 13 towns, three villages and two cities in the Counties of Madison and Oneida, New York.[2] Verona and Vernon are two of those towns.[3] In

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[1] Pursuant to S. Ct. Rule 37.2, counsel of record for all parties received notice at least ten days prior to the due date of the Towns' intention to file this brief. Pursuant to Rule 37.4, the authorized law officer of the Towns appears as co-counsel.

[2] O'BRIEN & GERE, COMMENTS ON THE ONEIDA INDIAN NATION'S LAND IN TRUST APPLICATION (GROUP 3 PARCELS) ONEIDA AND MADISON COUNTIES, NY, STATE OF NEW YORK EXECUTIVE CHAMBER, ALBANY,

Verona, the OIN purchased 224 separate parcels, totaling 8,565 acres, or about 19% of the Town's total acreage.[4] The Turning Stone Casino Resort, by far the most valuable of the OIN's properties, is located in Verona. In Vernon, the OIN purchased 37 separate parcels, totaling 1,919 acres or about 8% of the Town's acreage.[5] The Atunyote Golf Club, the OIN's newly constructed PGA-championship golf course, is in Vernon.

Under this Court's opinion in *Sherrill*, these parcels fall within the sovereign jurisdiction of the State of New York and its municipalities, including the *amici* Towns, and the OIN lacks authority to allege and invoke sovereignty over the land. Nevertheless, the OIN continues to assert sovereign immunity over its landholdings to shield them from local taxation, zoning, environmental and all other regulatory oversight. As a result, the Towns and their residents suffer first-hand the practical difficulties of checkerboard jurisdiction that this Court recognized in *Sherrill*.

The "embers of sovereignty" that this Court found extinguished in *Sherrill* continue to smolder in the Towns of Verona and Vernon. The *amici* therefore have a significant interest in a definitive resolution of the questions presented in this case.

NEW YORK I (2006) [hereinafter "O'Brien & Gere Group 3 Report"], *available at* http://www.dec.ny.gov/docs/legal_protection_pdf/oingrp3rprt.pdf.

[3] Verona, founded in 1802, occupies 69.7 square miles in central New York and in 2000 had a population of 6,425 persons. Vernon, also founded in 1802, occupies 38.1 square miles and had a population in 2000 of 5,335 persons.

[4] O'Brien & Gere Group 3 Report, *supra* note 2, at 54.

[5] *Id.*

SUMMARY OF THE ARGUMENT

The Court should grant *certiorari* because this case presents a matter of substantial importance appropriate for review under Rule 10 of the Rules of the United States Supreme Court. Despite this Court's opinion in *Sherrill*, the OIN continues to assert sovereignty over its fee lands in central New York and to resist the lawful authority of the State of New York and its municipalities. Local communities cannot self-govern and cannot maintain their essential character, because land use, environmental and other laws are effective only if they apply uniformly and equitably over an extended geographic area. This is a matter of national concern, as tribes across the nation purchase lands and raise tribal sovereignty to shield their landholdings from state and local laws and regulations.

The Court should grant the Petition because the lower court decided an important question of federal law in a way that conflicts with relevant decisions of this Court. U.S. Sup. Ct. R. 10(c). The lower court barred Petitioners, on tribal sovereignty grounds, from foreclosing on the OIN's fee lands for non-payment of property taxes. This is irreconcilable with this Court's conclusion in *Sherrill*, that the OIN cannot assert sovereignty, either affirmatively or defensively, to immunize its fee lands from the imposition and collection of property taxes. If the tribe can invoke sovereignty to prevent foreclosure, this will vitiate the Court's holding in *Sherrill*. The lower court's decision also conflicts with *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), which draws a distinction between *in rem* and *in personam* proceedings in the context of an assertion of tribal immunity, and affirms the power of state and local taxing authorities to bring an *in rem* foreclosure proceedings against a tribe's fee lands to collect lawfully imposed property taxes. This Court's review is necessary to correct the lower court's error.

The Court should also grant the Petition because the court below decided an important federal question in a way that conflicts with the decisions of two state courts of last resort. U.S. Sup. Ct. R. 10(a). Specifically, the decision below conflicts with the Supreme Court of the State of North Dakota in *Cass County Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*, 2002 ND 83, 643 N.W.2d 685 (2002), which allowed a state court to exercise *in rem* jurisdiction in a proceeding to condemn land held in fee by an Indian tribe, notwithstanding the assertion of tribal sovereign immunity. It also conflicts with the Supreme Court of the State of Washington in *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash. 2d 862, 869-872, 929 P.2d 379, 383-384 (1996), which allowed a state court to assert jurisdiction over land transferred to an Indian tribe, despite a claim of sovereign immunity, because the land was alienable and encumberable under a federally issued fee patent, and the action ran against the property *in rem* and not against the tribe *in personam*. This Court's review is necessary to resolve the conflict.

ARGUMENT

POINT I

THIS CASE PRESENTS A MATTER OF SUBSTANTIAL IMPORTANCE WITH RECURRING PRACTICAL SIGNIFICANCE

The OIN's landholdings in Verona and Vernon are part of the fabric of the community, Indian and non-Indian parcels woven together through roads, bridges, water, sewers, schools, and other community resources. Post-*Sherrill*, the OIN has continued to act with respect to its lands as if it is a sovereign nation, independent and completely immune from the reach of state and local laws and regulations. The OIN's assertion of sovereignty raises a host of issues expanding far beyond the property taxes at issue here, to critical issues regarding land use, code

enforcement, environmental protection and other public health, safety and welfare concerns.

The economic impact of the OIN's refusal to pay taxes is significant. In Verona, where the Turning Stone Casino is located, the OIN's annual property tax liability in 2006 (county and town combined) was $3.8 million. This represented 98% of the total county and town property taxes (excluding school taxes) on all other taxable land in Verona combined.[6] To put this into a local perspective, in 2006, the loss of $445,665 in real property tax revenue represented about 20% of Verona's total 2006 budget. In Vernon, the loss of $7,089 in property tax revenue was equivalent to 263% of the Town's annual public safety spending in 2006, or 23% of its annual contracted utility services spending.[7] In 2010, the shortfall increased to $22,292, or 10% of Vernon's total tax levy. The loss of tax revenues strains the resources of local government and places a disproportionate burden upon taxpaying landowners.

The OIN's explosive growth and development has significantly increased the demand for municipal services to the OIN-owned land. The OIN's consumption of water is illustrative. The Turning Stone complex draws its water from the Town of Verona, which in turn relies upon the City of Oneida for its supply. The OIN's ever-increasing demand for water at Turning Stone, an estimated 600,000 gallons per day, far exceeds the tribe's permitted capacity of 150,000 gallons per day.[8] Ongoing unrestrained development, including the recent addition of the Atunyote Golf Club in Vernon, further strains limited resources. Verona bills the

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[6] O'Brien & Gere Group 3 Report, *supra* note 2, at 56.

[7] *Id.* at 57.

[8] Kent Gardner, CENTER FOR GOVERNMENTAL RESEARCH, INC., JURISDICTIONAL AND ECONOMIC IMPACTS OF GRANTING THE ONEIDA INDIAN NATION'S APPLICATION TO TAKE LANDS INTO TRUST IN ONEIDA AND MADISON COUNTIES 20, 31 (2006) [hereinafter "CGR REPORT"], *available at* http://www.madisoncounty.org/motf/judicial_eco.pdf.

OIN for water the same way that it bills its other water customers. Unlike other customers, however, if the OIN does not pay its bills, the Town cannot compel payment through an assessment on real property. Because the OIN claims sovereignty and refuses to participate in the permitting process, local government had no opportunity to plan for increases in system demand, to reconcile the needs of the OIN properties and the rest of the community, or to distribute the cost of necessary system upgrades. Having had no role at the planning stages, the Towns and other local municipalities now shoulder the burden of managing resources for the entire community.

Highway maintenance is another example. In 2006, the Turning Stone complex received more than 4.5 million visitors,[9] up from 3.5 million in 2000 and about 2.1 million in 1995.[10] Attendance during the week averages 3,000-5,000 visitors and grows to as many as 8,000 on weekends.[11] The increased traffic from the highway to the various OIN properties and enterprises, including the Turning Stone Casino, two hotels, 12 SavOn gas stations and convenience stores, golf courses and other businesses, burdens the transportation infrastructure and requires additional expenditures for maintenance. With the constant flow of traffic into the casino, night and day, it costs the Towns more to plow, sand and salt roads and bridges than before the OIN's commercial expansion. The increased costs arrive without a compensating increase in tax revenues.

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[9] Turning Stone Resort & Casino Media Club, http://www.turningstone.com/pressclub/ (follow "Press Kits: Turning Stone Overview" hyperlink).

[10] Traci Gregory, *Turning Stone Attendance Grows Amid Some Losses*, ALLBUSINESS, Dec. 8, 2006, http://www.allbusiness.com/accommodation-food-services/accommodation/4062344-1.html.

[11] CGR REPORT, *supra* note 8, at 31.

The OIN does not have a fire department. Instead, the Verona volunteer fire district provides fire protection and rescue services to the Turning Stone Casino and other OIN properties.[12] In 1997, the OIN built the 20-story Tower Hotel, the tallest building in the 143-mile corridor between Albany and Syracuse,[13] without complying with the New York State Environmental Quality Review Act or the local permitting process. To service the building, the Verona volunteer fire district incurs additional expenses to train firefighters in high-rise firefighting techniques, and for increased insurance expenses due to the heightened risks.[14] Local volunteer fire districts rely on local property tax revenues to purchase equipment, build facilities and pay operating expenses. The OIN, however, refuses to pay its property taxes.

In 1993, the OIN and the Verona fire district negotiated an agreement for fire protection services based on the square footage of the buildings serviced. As the OIN acquired more property within the fire district and grew its casino enterprise, the parties renegotiated the contract annually, often with disagreements on the appropriate payment rate. In 2004, the OIN unilaterally canceled the "square foot basis" rate and capped the payments at a fixed dollar amount, representing but a fraction of the amount that the former compensation formula would have yielded on the expanded casino-resort complex. Moreover, as the payments are voluntary, the OIN can discontinue them at any time.[15]

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[12] *Quarterly Check Presented to Verona FD*, OneidaIndianNation.com, May 3, 2010, http://www.oneidaindiannation.com/inthecommunity/92691064.html.

[13] *See* Turning Stone Resort & Casino Media Club, *supra* note 9.

[14] Aaron Gifford, *Experts: High-Rise Fires Need Massive, Immediate Response*, SYRACUSE POST-STANDARD, Feb. 26, 2006, at A-1; CGR REPORT, *supra* note 8, at 33.

[15] CGR REPORT, *supra* note 8, at 33.

Many residents in the Towns of Vernon and Verona and the City of Sherrill, OIN and non-Indian alike, send their children to the Vernon-Verona-Sherrill ("VVS") school district. The school district depends on two major sources of revenue to fund educational services: local property taxes and state educational aid. As of September 2005, the assessed value of OIN-owned property was $404,177,300, or about 48% of the total assessed property value in the VVS district.[16] On an annual basis, these parcels represent about $10.2 million in school district revenue, or 36.7% of the district's overall 2006 budget of $27.8 million. When the OIN refuses to pay its property taxes, this affects the district's ability to provide educational services to children, including the OIN's children, and triggers tax increases to non-Indian property taxpayers.[17] As the OIN purchases additional lands, the potential that the property tax revenue associated with the newly acquired lands will go unpaid increases.

The loss of taxes on the OIN properties means that other property owners, largely individual homeowners, farmers and small businesses, will shoulder a greater portion of the cost of municipal services. The OIN enjoys the benefits, in that tribal members consume water, travel on roads and bridges, receive fire protection and send their children to local schools, but it is the wider community, which is 99% non-Indian,[18] that foots the bill. This is a real and ongoing hardship to the residents, who are older and

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[16] O'Brien & Gere Group 3 Report, *supra* note 2, at 60-61.

[17] The taxpayers of Oneida County pay increased taxes on their county tax bills to satisfy the shortfall on the OIN properties and to make the towns and schools whole. Under the lower court's opinion, however, the Counties cannot take action to recoup those funds, as they could on other tax-delinquent lands, through foreclosure proceedings.

[18] U.S. Dept. of Commerce, Census Bureau, Census of Population and Housing, Summary Population and Housing Characteristics: New York, 2000 PHC-1-34, Table 3, pp. 119, 124 (July 2002), *available at* http://www.census.gov/prod/cen2000/phc-1-34.pdf.

poorer on average than the nation at large.[19] To make matters worse, the OIN's claimed immunity from and refusal to pay taxes gives OIN-owned businesses (hotels, restaurants, gas stations, convenience stores and other enterprises) an unfair competitive advantage over all the local businesses that do pay their taxes.

In addition to the burdens resulting from the loss of tax revenue, the inability to enforce land use and environmental laws and regulations has a profound impact on the administration of government. One of the central features that draws residents to Verona and Vernon is the character of these communities. Through comprehensive planning and zoning, local governments enact and implement laws, regulations and processes to protect community character and to provide a basis for future development. The Town of Vernon, for example, has a rich agricultural heritage. Through the comprehensive planning process, Vernon encourages an economic climate that supports and promotes the development of agribusiness.[20] The Town of Verona is characterized by rural land uses with residential homes spread sparsely throughout the town.[21] Verona uses its zoning ordinance to preserve its community's rural nature. In recent years, the OIN has undertaken its construction projects -- the casino, hotels, restaurants, golf courses, gas stations, convenience stores, and campgrounds -- without participating in the local planning, permitting and zoning processes.[22] Where, as here,

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[19] CGR REPORT, *supra* note 8, at 35; *see also* U.S. Dept. of Commerce, Census Bureau, Census of Population and Housing. Summary Population and Housing Characteristics: New York, 2000 PHC-1-34, Table 1, p. 24-25 (July 2002), *available at* http://www.census.gov/prod/cen2000/phc-1-34.pdf.

[20] O'Brien & Gere Group 3 Report, *supra* note 2, at 64, *citing* BARTON & LOGUIDICE, TOWN OF VERNON, COMMUNITY COMPREHENSIVE PLAN (Sept. 2005).

[21] *Id.* at 65.

[22] CGR REPORT, *supra* note 8, at 11.

a group claims exemption from planning and zoning requirements, it undermines the local government's ability to manage shared resources, to preserve the character of the community and to protect the land from environmental harm, governmental prerogatives for which the residents have justified expectations.

Environmental laws exist to protect human health and the environment through uniform and systematic requirements designed to limit and control pollutants and hazards. The OIN claims that it is an independent sovereign, not subject to state or local environmental regulations, and therefore does not need to obtain environmental approvals or to comply with state and local environmental standards. For example, the OIN built the golf course in Vernon after clear-cutting and burning trees on the heavily forested site without regard to the impact of the spread of smoke on neighboring landowners.[23] It operates its golf courses without regulatory oversight over chemical and pesticide application or the impact of run-off on streams and wetlands. Due to the complex interrelationships in the environment, the potential for harm extends far beyond the OIN's properties and into the surrounding areas.

Environmental impacts do not respect property boundaries. The effectiveness of land use and environmental laws rests on the ability of government to enforce the laws uniformly over a broad geographic area. The inability to enforce state environmental laws with respect to the OIN lands effectively prevents local government from protecting the environment for non-Indian property owners on lands adjacent or proximate to those lands.

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[23] *See* Elizabeth Cooper, *Nation's Projects Impacted Wetlands*, UTICA OBSERVER-DISPATCH, May 10, 2008, *available at* http://www.uticaod.com/news/x2118735187/Nations-projects-impacted-wetlands.

The impact of this case is far-reaching. The OIN's sovereignty claims, which manifest themselves here through the OIN's challenge to foreclosure proceedings for the non-payment of property taxes, vitiate the ability of local governments to govern and to meet the reasonable expectations of their citizens. If counties cannot enforce the payment of property taxes, then towns will encounter similar obstacles in implementing their municipal plans, zoning ordinances, and other laws designed to protect public health, safety and welfare. And if a tribe, through unilateral open market purchases, can deprive state and local governments of the power to exercise their sovereign authority, then it would not take much to revert vast expanses to Indian jurisdiction, rendering the land-into-trust process a needless formality.

This case has national implications, as tribes across the Nation purchase historical lands and raise the shield of tribal sovereign immunity to oust the state and local governments of jurisdiction. Unless municipalities have the ability to foreclose for the non-payment of taxes, their authority to govern will be meaningless, and large stretches of land will revert to Indian control, parcel by parcel, in derogation of the legitimate interests of others with a stake in the area's governance and well-being.

POINT II

THE LOWER COURT'S DECISION CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

The Second Circuit held that the doctrine of "tribal immunity from taxation and other powers of the State, and tribal immunity from suit," bar the Counties from collecting *ad valorem* property taxes. Pet. App. 21a. This conclusion, which is irreconcilable with the Court's holdings in *Sherrill*, 544 U.S. 197, 214 (2005), and *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), paralyzes local municipalities and frees the

OIN to continue to flout state and local laws, to the detriment of the community at large.

A. The Decision Below Conflicts with *Sherrill* and *Yakima*

The court below erred in failing to give effect to this Court's holding in *Sherrill* that the OIN cannot raise sovereignty, either affirmatively or defensively, to immunize its fee lands from the imposition of property taxes. Importantly, *Sherrill* was an action for eviction, following the OIN's refusal to pay property taxes in the City of Sherrill. The tribe sought declaratory and injunctive relief, based on its claim of sovereign immunity from local taxation, to prevent the City from enforcing payment. This Court rejected the tribe's claim of immunity, denied its request for injunctive and declaratory relief, and upheld Sherrill's authority to evict the OIN for non-payment of taxes. 544 U.S. at 202, 214 & n.7.

In rejecting the OIN's position, this Court placed "heavy weight" on New York State's "justifiable expectations," grounded in two centuries of the exercise of state regulatory jurisdiction, which until recently the OIN had not contested. *Id.* at 215-16. The Court recognized that a "[p]arcel-by-parcel revival of the [OIN's] sovereign status" would have "disruptive practical consequences," because it would create a "checkerboard of alternating state and tribal jurisdiction in New York State," which would "'seriously burde[n] the administration of state and local governments'" and "adversely affect landowners neighboring tribal patches." *Id.* at 219-20 (citations omitted). The Court refused to allow the OIN to "unilaterally reassert sovereign control and remove these parcels from the local tax rolls." *Id.* at 220; *see also Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998) (mere purchase of land by tribe insufficient to place land back under federal protection and exempt it from state or local property taxes).

This case is *déjà vu* all over again.[24] To conclude, as did the court below, that *Sherrill* allowed for the imposition but not the collection of taxes is to ignore the equitable basis for and the effect of this Court's opinion. *Sherrill* makes no distinction between a right and a remedy in rejecting the OIN's effort to rekindle the "embers of sovereignty." Equitable considerations of laches, acquiescence, and impossibility barred the tribe from invoking sovereign immunity, and the majority made clear that the equitable nature of the requested relief "remains the same whether asserted affirmatively or defensively." 544 U.S. at 214 n.7. These same equitable considerations apply, whether the OIN characterizes its challenge in terms of "land-based 'Indian sovereignty'" or "tribal immunity from suit." *See* Pet. App. 16a-17a. *Sherrill* is indistinguishable, and the court below erred in failing to adhere to this Court's binding precedent. The Court should grant *certiorari* to tie up the "loose ends" that *Sherrill* left hanging and which the OIN is now using to tie up and frustrate local government from exercising its legitimate and necessary powers to govern.

The lower court also erred in ignoring the significance of the *in rem* nature of property taxes, which run with the land and create a burden on the OIN's fee properties alone, without implicating tribal sovereign immunity. In *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 266 (1992), the Court drew a bright-line distinction between the *ad valorem* tax at issue there, which "flow[ed] exclusively from ownership of realty" and thus qualified as taxation of land, and an excise tax, which taxed the transaction of selling land, but not the land itself. The *ad valorem* was permissible, the Court held, because it implicated *in rem* jurisdiction over the alienable lands, not *in personam* jurisdiction over the Indian owners. 502 U.S. at 265; *cf. Tennessee Student Assistance Corp. v.*

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[24] YOGI BERRA, THE YOGI BOOK 48 (Workman Publishing 1998).

Hood, 541 U.S. 440, 453 (2004) (noting distinction between *in rem* and *in personam* jurisdiction in state sovereign immunity context). This type of tax would not create the "checkerboard" effect condemned in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), the Court reasoned, because it involved the same types of determinations that the tax assessor was accustomed to making on non-reservation land and would not significantly disrupt tribal self-government. 502 U.S. at 265. The excise tax, in contrast, was not taxation of a *res* and thus was not permissible.

By depriving Petitioners of the right to enforce the property tax obligation, the court below renders this Court's analysis in *Sherrill* meaningless and strips local municipalities of the ability to govern. *See Brendale v. Confederated Tribes & Bands of the Yakima Indian Nations*, 492 U.S. 408 (1989) (recognizing limits on concept of tribal sovereignty); *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 542 F.Supp.2d 908, 921 (E.D. Wisc. 2008) (unless the government can foreclose, "the Court's analysis in *Yakima*, *Cass County* and *Sherrill* amounts to nothing more than an elaborate academic parlor game."). The effect is to allow the tribe to oust the state and its municipalities from their exclusive prerogative, as the lawful taxing sovereigns, to collect *ad valorem* property taxes on fee lands within their boundaries. As this Court observed in *Sherrill*, 544 U.S. at 220, if the OIN can raise tribal sovereign immunity as a defense to the payment of lawfully imposed property taxes, there is nothing to prevent it from ignoring local zoning and other regulatory controls protecting all landowners in the area. Unless this Court grants review and reverses, it is clear that this is exactly what the OIN will continue to do.

B. *Potawatomi* and *Kiowa* Do Not Support the Decision Below

The lower court's reliance on two pre-*Sherrill* cases, *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), and *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), was completely misplaced. In *Potawatomi*, the issue was whether a state may assess and collect a tax on cigarettes to tribal members and non-members occurring on land held in trust for the tribe. This Court held that tribal immunity does not bar a state from taxing sales of cigarettes to nonmembers at the tribe's convenience store, but accepted that under *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976), the state could not enforce this personal tax for sales made in the past against Indian-owned property located within the trust land. 498 U.S. at 512-13. *Potawatomi* is distinguishable both because it involved activities on tribal trust lands that were "set apart for use of Indians," *id.* at 511, not fee land as in this case, *see Sherrill*, 544 U.S. at 214, and because it involved the imposition of personal liability upon an Indian tribe for the sale of cigarettes sold during a prior period without collecting the cigarette tax. Here, in contrast, the foreclosure proceeding runs with the land, not against the tribe, and thus does not implicate tribal immunity.

Notably, while barring the claim against the tribe, the Court in *Potawatomi* recognized that states may "of course" collect the cigarette tax from wholesalers by seizing unstamped cigarettes while the goods are en route to the reservation. *Id.* at 514 (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 161-62 (1980)). This observation highlights the essential distinction, for sovereign immunity purposes, between a claim against the person (*in personam*) and a claim against the property (*in rem*). The lower court erred in failing to discern and give to effect to that distinction.

For similar reasons, the court below erred in concluding that "[w]e are left then with the rule stated in *Kiowa*," that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." Pet. App. 20a (citing *Kiowa*, 523 U.S. at 754). In *Kiowa*, the issue was whether a court has jurisdiction over the person to enforce a promissory note between a corporation and an Indian tribe. The corporation argued that sovereign immunity should not apply because the liability arose from off-reservation activities and involved commercial, not governmental, activities, an argument the Court found unpersuasive. *Kiowa* stands for the proposition that a tribe enjoys sovereign immunity from contract claims arising from its commercial conduct, regardless of whether that conduct occurs on or off the reservation. 523 U.S. 755-56. That principle is inapplicable to this case involving the power of local government to enforce payment of lawful property taxes.

In view of these distinctions, it was the court below, not Petitioners, that improperly conflated the doctrines of tribal sovereign authority over reservation lands and tribal sovereign immunity from suit. *See* Pet. App. 14a-21a. Here, as the Court held in *Sherrill*, 544 U.S. at 214, the lands at issue are not sovereign Indian land. Thus, the foreclosure proceeding did not implicate the doctrine of sovereign authority over reservation lands. Further, as in *Yakima*, the tax foreclosure proceeding here runs with the land and not against the tribe. Thus, it does not implicate tribal sovereign immunity from suit. *Sherrill* and *Yakima* control, and *Potawatomi* and *Kiowa* do not warrant a different result. The Court should grant review to correct the error below.

POINT III

THE LOWER COURT'S DECISION CONFLICTS WITH TWO STATE COURTS OF LAST RESORT

The Second Circuit's decision cannot be reconciled with decisions by the Supreme Courts of Washington and North Dakota. Those decisions, which rely heavily on *Yakima*, recognized the distinction between *in rem* and *in personam* actions in rejecting tribal sovereign immunity defenses to condemnation and partition proceedings. In *Cass County Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*, 2002 ND 83, 643 N.W.2d 685 (2002), a county water district brought a condemnation action to acquire land which an Indian tribe had recently acquired. The North Dakota Supreme Court held that the state could exercise *in rem* jurisdiction in a proceeding to condemn land held in fee by Indian tribe, despite a claim of sovereign immunity. A condemnation action is strictly *in rem*, the North Dakota court reasoned, and thus runs against the property itself, not against the individual.

> A proceeding in rem is essentially a proceeding to determine rights in a specific thing or in specific property, against all the world, equally binding on everyone. It is a proceeding that takes no cognizance of an owner or person with a beneficial interest, but is against the thing or property itself directly, and has for its object the disposition of the property, without reference to the title of individual claimants.

Id. at 689 (citation omitted). Therefore, *in personam* jurisdiction is not required, and the proceeding did not implicate the doctrine of tribal sovereign immunity.

In *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash. 2d 862, 869-72, 929 P.2d 379, 383-384 (1996) (*en banc*), the Supreme Court of Washington

similarly held that a state court retained jurisdiction over an action to partition and quiet title to fee-patented lands located within a reservation. The property in question was formerly tribal land, held in trust by the United States with federal restrictions on alienation, which had acquired its fee simple status in 1958 when the United States issued a "fee patent" conveying ownership to specified persons and removing all restrictions on conveyance or encumbrance. The Supreme Court of Washington relied heavily upon *Yakima* in reaching its conclusion that a Washington state court could exercise *in rem* jurisdiction over the parcel. "A broad *in rem* state jurisdiction over fee patented lands can be concluded from the Supreme Court decision in County of Yakima," the court held. *Id.* at 875, 929 P.2d at 386.

The decision below clashes with *1.43 Acres of Land* and *Anderson*. Instead of recognizing the difference between *in rem* and *in personam* jurisdiction, the court below confused the two doctrines and incorrectly concluded that the OIN's "freedom from state taxation . . . arises from a tribe's sovereign authority over its reservation lands." Pet. App. 14a. In contrast, the North Dakota Supreme Court held in *1.43 Acres of Land* that "the State may exercise territorial jurisdiction over the land, including an *in rem* condemnation action, and the Tribe's sovereign immunity is not implicated." *1.43 Acres of Land*, 643 N.W.2d at 694. Likewise, the Washington Supreme Court concluded in *Anderson* that "[t]he subsequent sale of an interest in the property to an entity enjoying sovereign immunity (Quinault Nation) is of no consequence in this case because the trial court's assertion of jurisdiction is not over the entity *in personam*, but over the property or the 'res' *in rem*." *Anderson*, 130 Wash. 2d at 873, 929 P.2d at 385. The conflict between the decision below and these two state courts of last resort provides an additional reason to grant the Petition.

POINT IV

THE COURT SHOULD ACCEPT THE INVITATION TO REDEFINE THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY AND CLARIFY THE DISESTABLISHMENT OF THE ANCIENT ONEIDA RESERVATION

The Towns further support Petitioners' suggestion that the Court redefine the doctrine of tribal sovereign immunity. As described above, the OIN wields the doctrine of sovereign immunity in a way that excessively burdens the administration of local government. This harms the Towns and their predominantly non-Indian residents, many of whom owned their land before the OIN's recent purchases and have no recourse against the invasion of their legal rights. In *Potawatomi*, 498 U.S. at 514-15, Justice Stevens, concurring, criticized tribal immunity as "founded upon an anachronistic fiction" and suggested that it might not extend to off-reservation commercial activity. This Court retained the doctrine on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency. *Id.* at 510. In *Kiowa*, the Court recognized that there may be "reasons to doubt the wisdom of perpetuating the doctrine," 523 U.S. at 758, but felt compelled to adhere to it because Congress had not dispensed with it. *Id.* at 759-760. State and local municipalities have a strong, indeed overriding interest in enforcing their laws on non-Indian lands and protecting their citizenry. Sovereign immunity, as applied in this case, encroaches on the authority of local government to administer its laws. The time has come to reconsider the doctrine, and this Court, having developed the doctrine, is best positioned to redefine it. The time is ripe to do so.

Finally, the Towns join in the Petitioners' request to clarify the status of the ancient Oneida reservation. In *Sherrill*, after rejecting the OIN's unification theory and

ruling that the tribe could not exercise sovereignty over the purchased lands, this Court declined to decide whether the Oneidas' historic reservation had been disestablished. 544 U.S.at 215 n.9. In the years since *Sherrill*, the lower courts and the tribe have seized upon this language to maintain that the historic reservation remains in place. The same considerations that led this Court in *Sherrill* to hold that the OIN cannot exercise sovereignty over the land also support the conclusion that the land in question is not an Indian reservation. *Cf. Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010) (state's unquestioned exertion of jurisdiction over area and predominantly non-Indian population and land use supports conclusion of reservation disestablishment).

In Verona and Vernon today, the uncertainties surrounding the current status of the OIN's fee lands foment continuing controversy and threaten to reignite embers that long ago grew cold. Clarity on the issue is both desirable and necessary.

CONCLUSION

For all the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfull y submitted.

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JOINT APPENDIX

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IN THE

Supreme Court of the United States

MADISON COUNTY and
ONEIDA COUNTY, NEW YORK

Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK,

Respondent,

STOCKBRIDGE-MUNSEE COMMUNITY,
BAND OF MOHICAN INDIANS,

Putative Intervenor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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U.S. DISTRICT COURT NORTHERN DISTRICT OF NEW YORK ONEIDA INDIAN NATION V. MADISON COUNTY, CIVIL DOCKET FOR CASE #: 5:00-CV-00506-DNH-GJD

03/30/2000 1 COMPLAINT filed; FILING FEE $ 150.00 RECEIPT # 47142; Service deadline 5/29/00 for Madison County (tjm) Additional attachment(s) added on 11/8/2005 (see). (Entered: 03/30/2000)

11/06/2003 33 ANSWER & DEFENSES: to Complaint; with Demand for Jury Trial, and COUNTERCLAIM by Madison County (Attorney G. Robert Witmer, Jr., and David M. Schraver) against Oneida Indian Nation (jmb) Additional attachment(s) added on 11/8/2005 (see). (Entered: 11/10/2003)

11/26/2003 38 ANSWER/REPLY: by Peter D. Carmen, Esq., and Michael R. Smith, Esq., on behalf of Oneida Indian Nation to [33-2] Counterclaim (jmb) Additional attachment(s) added on 11/8/2005 (see). (Entered: 11/28/2003)

06/07/2005 48 MOTION for Preliminary Injunction Motion Hearing set for 7/8/2005 10:00 AM in Utica before Magistrate Judge David Hurd. Response to Motion due by 6/21/2005 Reply to Response to Motion due by 6/27/2005 by Oneida Indian Nation of New York. (Attachments: # 1 Memorandum of Law IN Support of Application for a Preliminary Injunction #2 Declaration of Peter D. Carmen in Support of Application for a Preliminary Injunction # 3 Exhibit(s) Carmen Dec. Ex.

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1 # 4 Exhibit(s) Carmen Dec. Ex. 2 # 5 Exhibit(s) Carmen Dec. Ex. 3-1 (Part 1) # 6 Exhibit(s) Carmen Dec. Ex. 3-1 (part 2) # 7 Exhibit(s) Carmen Dec. Ex. 3-2 (Part 1) # 8 Exhibit(s) Carmen Dec. Ex. 3-2 (Part 2) # 9 Exhibit(s) Carmen Dec. Ex. 3-3 # 10 Exhibit(s) Carmen Dec. Ex. 3-4 # 11 Exhibit(s) Carmen Dec. Ex. 3 # 12 Exhibit(s) Carmen Dec. Ex. 4 # 13 Exhibit(s) Carmen Dec. Ex. 5 # 14 Exhibit(s) Carmen Dec. Ex. 6 # 15 Exhibit(s) Carmen Dec. Ex. 7 # 16 Exhibit(s) Carmen Dec. Ex. 8 # 17 Exhibit(s) Carmen Dec. Ex. 9 # 18 Exhibit(s) Carmen Dec. Ex. 10 # 19 Exhibit(s) Carmen Dec. Ex. 11 # 20 Exhibit(s) Carmen Dec. Ex. 12 # 21 Exhibit(s) Carmen Dec. Ex. 13 # 22 Exhibit(s) Carmen Dec. Ex. 14 # 23 Exhibit(s) Carmen Dec. Ex. 15 # 24 Exhibit(s) Carmen Dec. Ex. 16 # 25 Exhibit(s) Carmen Dec. Ex. 17 # 26 Exhibit(s) Carmen Dec. Ex. 18)(Carmen, Peter)(Entered: 06/07/2005)

06/07/2005 49 MOTION for Summary Judgment Motion Hearing set for 7/8/2005 10:00 AM in Utica before Judge David N. Hurd. Response to Motion due by 6/21/2005 Reply to Response to Motion due by 6/27/2005 by Oneida Indian Nation of New York. (Attachments: # 1 Memorandum of Law in Support of Motion for Summary Judgment # 2 Declaration of Paul A. Thomas, Jr. # 3 Statement of Material Facts # 4 Declaration of Peter D. Carmen # 5 Exhibit(s) A to Carmen Dec. # 6 Exhibit(s) B to Carmen Dec. # 7 Exhibit(s) C to Carmen Dec. # 8 Exhibit(s) D to Carmen

Dec. # 9 Exhibit(s) E to Carmen Dec. # 10 Exhibit(s) F to Carmen Dec. # 11 Exhibit(s) G to Carmen Dec. # 12 Exhibit(s) H to Carmen Dec. # 13 Exhibit(s) I to Carmen Dec. # 14 Exhibit(s) J to Carmen Dec. # 15 Exhibit(s) K to Carmen Dec. # 16 Exhibit(s) L to Carmen Dec. # 17 Exhibit(s) M to Carmen Dec. # 18 Exhibit(s) N to Carmen Dec. # 19 Exhibit(s) O to Carmen Dec. # 20 Exhibit(s) P to Carmen Dec. # 21 Exhibit(s) Q to Carmen Dec.)(Carmen, Peter) (Entered: 06/07/2005)

6/21/2005 54 MEMORANDUM OF LAW *(amicus) opposing OIN preliminary injunction motion* filed by State of New York. (Attachments: # 1 Affirmation of David B. Roberts # 2 Exhibit(s) A (6/10/05 letter from DOI) # 3 Exhibit(s) B (OIN Sherill brief before SC) # 4 Exhibit(s) C (State amicus Sherrill " 2d Cir.) # 5 Exhibit(s) D (State amicus Sherrill " S Ct) # 6 Affidavit of service)(Roberts, David) (Entered: 06/21/2005)

06/21/2005 55 MOTION for Leave to File *Motion to Dismiss Pursuant to Rule 19* Motion Hearing set for 6/29/2005 10:00 AM in Utica before Judge David N. Hurd. Response to Motion due by 6/13/2005 Reply to Response to Motion due by 6/20/2005. by Madison County. (Attachments: # 1 Memorandum of Law In Support of Notice of Motion for Leave to File Motion to Dismiss Pursuant to Rule 19 # 2 Affidavit of David M. Schraver in Support # 3 Exhibit(s) Exhibit A to Affidavit # 4 Exhibit(s) Exhibit B #5 Certificate of Service)(Schraver, David) (Entered: 06/21/2005)

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06/21/2005 56 MEMORANDUM OF LAW *in Opposition to Plaintiff's Application for a Preliminary Injunction* filed by Madison County. (Attachments: # 1 Affidavit Affidavit of David M. Schraver # 2 Affidavit Landers Affidavit in Support # 3 Affidavit Richards Affidavit in Support # 4 Affidavit Slivinski Affidavit in Support # 5 Affidavit Oot Affidavit in Support # 6 Certificate of Service # 7 Exhibit(s) Exhibits A-C to Schraver Affidavit # 8 Exhibit(s) Exhibit E part 1 to Schraver Affidavit # 9 Exhibit(s) Exhibit E part 2 to Schraver Affidavit # 10 Exhibit(s) Exhibit F to Schraver Affidavit # 11 Exhibit(s) Exhibit D to Schraver Affidavit)(Schraver, David) (Entered: 06/21/2005)

06/21/2005 58 MOTION to Dismiss by Madison County. (Attachments: # 1 Memorandum of Law in Support of Its Motion to Dismiss # 2 Declaration in Support of Madison County's Motion to Dismiss)(Schraver, David) (Entered: 06/21/2005)

06/27/2005 61 MEMORANDUM OF LAW re 48 Motion for Preliminary Injunction,54 Memorandum of Law, 56 Memorandum of Law,, *in further support of Motion for Preliminary Injunction*, filed by Oneida Indian Nation of New York. (Attachments: # 1 Declaration in reply of Peter D. Carmen dated June 27, 2005 # 2 Exhibit(s) A to Carmen Dec. # 3 Exhibit(s) B to Carmen Dec. # 4 Exhibit(s) C to Carmen Dec. # 5 Exhibit(s) D to Carmen Dec. # 6 Exhibit(s) E to Carmen Dec. # 7 Exhibit(s) F to Carmen Dec. # 8 Exhibit(s) G to Carmen Dec. # 9 Exhibit(s) H to Carmen Dec. # 10 Exhibit(s) I to Carmen Dec. # 11 Declaration of Hugh

C. Lordon dated June 27, 2005)(Carmen, Peter) (Entered: 06/27/2005)

06/27/2005 62 MEMORANDUM OF LAW re 55 Motion for Leave to File, *in Opposition to Madison County's motion for leave to file motion to dismiss under FRCP 19*, filed by Oneida Indian Nation of New York. (Attachments: # 1 Declaration of Peter D. Carmen, dated June 27, 2005, in opposition to Madison County's motion for leave to file motion to dismiss # 2 Exhibit(s) 1 to Carmen Dec. # 3 Exhibit(s) 2 to Carmen Dec. # 4 Exhibit(s) 3 to Carmen Dec. # 5 Exhibit(s) 4 to Carmen Dec. # 6 Exhibit(s) 5 to Carmen Dec. # 7 Exhibit(s) 6 to Carmen Dec. # 8 Exhibit(s) 7 to Carmen Dec. # 9 Exhibit(s) 8 to Carmen Dec. # 10 Exhibit(s) 9 to Carmen Dec. # 11 Exhibit(s) 10 to Carmen Dec. # 12 Exhibit(s) 11 to Carmen Dec. # 13 Exhibit(s) 12 to Carmen Dec. # 14 Exhibit(s) 13 to Carmen Dec.)(Carmen, Peter) (Entered: 06/27/2005)

06/28/2005 63 LETTER BRIEF *to Judge Hurd re: 2nd Circuit Decision* by Madison County. (Attachments: # 1 Exhibit(s) Decision in *Cayuga Indian Nation v. Pataki*)(Witmer, G.) (Entered: 06/28/2005)

06/29/2005 64 Minute Entry for proceedings held before Judge David N. Hurd: Motion Hearing held on 6/29/2005 in Utica, NY. (Court Reporter Nancy Freddoso) (cmr) (Entered: 06/29/2005)

06/29/2005 65 ORDER, denying Madison County's 55 Motion for Leave to File a motion to dismiss.

Signed by Judge David N. Hurd on 6/29/2005. (see) (Entered: 06/29/2005)

07/01/2005 66 MEMORANDUM-DECISION & ORDER & PRELIMINARY INJUNCTON: granting pltf's 48 Motion for Preliminary Injunction; that Madison County & its officers, agents, servants, & employees & all persons & entities in active concert of participation w/them are hereby ENJOINED & RESTRAINED from taking any action to foreclose upon property in the possession of the Oneida Indian Nation of New York; from interfering w/the Oneida Indian Nation of New York's ownership, possession, or occupancy of its properties; & from taking any act to evict the Oneida Indian Nation of New York or its officers, agents, servants, employees, members, guests, customers or invitees from its properties; & that the Oneida Indian Nation of New York shall post w/the Clerk security in the sum of $3,000,000.00 on or before 7/12/2005, or this preliminary injunction will be subject to being vacated upon motion of the County. Signed by Judge David N. Hurd on 7/1/2005. (see) (Entered: 07/01/2005)

07/05/2005 90 Copy of U.S. Supreme Court Decision in *City of Sherrill vs. Oneida Indian Nation*, 125 S. Ct. 1478 (2005). (cbm) (Entered: 09/15/2005)

07/06/2005 69 Letter from David M. Schraver for Madison County requesting Request for Madison County to move to amend its Answer submitted to Judge David N. Hurd. (Schraver, David) (Entered: 07/06/2005)

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07/11/2005 71 ORDER, that the deft's answer will be considered to assert any & all defenses which provided the basis of the Supreme Court's decision in *City of Sherrill New York -v- Oneida Indian Nation of New York, et al.* Signed by Judge David N. Hurd on 7/11/2005. (see) (Entered: 07/11/2005)

08/04/2005 74 Cross-MOTION for Summary Judgment Motion Hearing set for 9/7/2005 10:00 AM in Utica before Judge David N. Hurd. Response to Motion due by 8/22/2005 Reply to Response to Motion due by 8/29/2005 by Madison County. (Attachments: # 1 Memorandum of Law In Opposition to Plaintiff's Motion for Summary Judgment and in Support of Cross-Motion # 2 Supplement Lexis citations in memorandum of law # 3 Statement of Material Facts in Support of Madison County's Cross-Motion for Summary Judgment # 4 Affidavit of David M. Schraver in Support of Defendant's Cross-Motion for Summary Judgment # 5 Exhibit(s) Exhibit A to Schraver Affidavit # 6 Exhibit(s) Exhibit A continued # 7 Exhibit(s) Exhibit A continued # 8 Exhibit(s) Exhibit A continued # 9 Exhibit(s) Exhibit A continued # 10 Exhibit(s) Exhibit A continued # 11 Exhibit(s) Exhibit A continued # 12 Exhibit(s) Exhibit A continued # 13 Exhibit(s) Exhibit A continued # 14 Exhibit(s) Exhibit B and C to Schraver Affidavit # 15 Affidavit Affidavit of Rocco J. DiVeronica # 16 Exhibit(s) Exhibit A to DiVeronica Affidavit # 17 Exhibit(s) Exhibit B to DiVeronica Affidavit # 18 Statement of Material Facts Defendant's Response to Statement of Undisputed Facts # 19 Supplement Certificate of Service)(Schraver, David) (Entered: 08/04/2005)

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08/05/2005 75 MEMORANDUM OF LAW re 58 Motion to Dismiss *in opposition to Madison County's Motion to Dismiss* filed by Oneida Indian Nation of New York. (Attachments: # 1 Affidavit of Service of Plaintiff's Memorandum of Law Opposing Defendant Madison County's Motion to Dismiss)(Carmen, Peter) (Entered: 08/05/2005)

08/05/2005 76 MEMORANDUM OF LAW *of Amicus in Opposition to Oneida Nation SJ Motion and in Support of Madison County's cross-motion for SJ* filed by State of New York. (Attachments: # 1 Affirmation of David Roberts AAG # 2 Exhibit(s) Ex A # 3 Exhibit(s) Ex B # 4 Exhibit(s) Ex C # 5 Exhibit(s) Ex D # 6 Declaration of Service)(Roberts, David) (Entered: 08/05/2005)

08/25/2005 80 REPLY to Response to Motion re 58 MOTION to Dismiss filed by Madison County. (Schraver, David) (Entered: 08/25/2005)

08/26/2005 81 REPLY DECLARATION: filed by Peter D. Carmen. Esq., on behalf of Oneida Indian Nation of New York to Response to # 49 MOTION for Summary Judgment, and in opposition to # 74 Cross-MOTION for Summary Judgment. (Attachments: # 1 Statement of Material Facts # 2 Memorandum of Law)(jmb) (Entered: 08/29/2005)

08/26/2005 82 EXHIBITS A and B1 filed by Oneida Indian Nation of New York in support of # 81 Reply Declaration of Peter D. Carmen. (Attachments:

1 Exhibit B1 - Pages 1-30 # 2 Exhibit B1 - Pages 31-61 # 3 Exhibit B1 - Pages 62-92 # 4 Exhibit B1 - Pages 93-123 # 5 Exhibit B1 - Pages 124-154 # 6 Exhibit B1 - Pages 155-170 # 7 Exhibit B1 Pages 171-185 # 8 Exhibit B1 - Pages 186-216 # 9 Exhibit B1 - Pages 217-247 # 10 Exhibit B1 - Pages 248-270 # 11 Exhibit B1 - Pages 271-301 # 12 Exhibit B1 - Pages 302-332 # 13 Exhibit B1 - Pages 333-346)(jmb) (Entered: 08/29/2005)

08/26/2005 83 EXHIBIT B2 filed by Oneida Indian Nation of New York in support of #81 Reply Declaration of Peter D. Carmen, Esq. (Attachments: # 1 Exhibit B2 - Pages 26-50 # 2 Exhibit B2 - 51-75 # 3 Exhibit B2 - Pages 76-99 # 4 Exhibit B2 - Pages 100-112 # 5 Exhibit B2 - Pages 113-120 # 6 Exhibit B2 - Pages 121-125 # 7 Exhibit B2 - Pages 126-150 # 8 Exhibit B2 - Pages 151-175 # 9 Exhibit B2 - Pages 176-199 # 10 Exhibit B2 - Pages 200-233 # 11 Exhibit B2 - Pages 234-266 # 12 Exhibit B2 - Pages 267-299 # 13 Exhibit B2 - Pages 300-350)(jmb) (Entered: 08/29/2005)

08/26/2005 84 EXHIBIT B3 filed by Oneida Indian Nation of New York in support of the # 81 Reply Declaration of Peter D. Carmen. (Attachments: # 1 Exhibit B3 - Pages 34-66 # 2 Exhibit B3 - Pages 67-99 # 3 Exhibit B3 - Pages 100-133 # 4 Exhibit B3 - Pages 134-166 # 5 Exhibit B3 - Pages 167-199 # 6 Exhibit B3 - Pages 200-233 # 7 Exhibit B3 - Pages 234-273) (jmb) (Entered: 08/30/2005)

08/26/2005 85 EXHIBIT C filed by Oneida Indian Nation of New York in support of # 81 Reply Declaration, documents (MAPS) not uploaded to the CM/ECF system as they could not be reduced to the

proper electronic size. The MAPS will be maintained in their original printed form (not electronically) on file with the Office of the Clerk. (jmb) (Entered: 08/30/2005)

08/26/2005 86 EXHIBITS D through Q : filed by Oneida Indian Nation of New York in support of the # 81 Reply Declaration of Peter D. Carmen, Esq. (Attachments: # 1 Exhibit E # 2 Exhibit F # 3 Exhibit G # 4 Exhibit H # 5 Exhibit I # 6 Exhibit J # 7 Exhibit K # 8 Exhibit L # 9 Exhibit M # 10 Exhibit N # 11 Exhibit O # 12 Exhibit P # 13 Exhibit Q)(jmb) (Entered: 08/30/2005)

09/07/2005 87 Minute Entry for proceedings held before Judge David N. Hurd: Motion Hearing held on 9/7/2005 in Utica, NY re 49 MOTION for Summary Judgment filed by Oneida Indian Nation of New York, 74 Cross-MOTION for Summary Judgment filed by Madison County, 58 MOTION to Dismiss filed by Madison County, Motions Taken Under Advisement. Ct. to issue written decision. (Court Reporter Nancy Freddoso) (cmr) (Entered: 09/07/2005)

7/05/2005 89 Copy of MANDATE of USCA, certified 6/24/05, recalling 10/10/03 mandate and remanding the consolidated appeals (consolidated with 5:00"cv"223 at the Court of Appeals) for further proceedings consistent with Supreme Court decision in City of Sherrill vs. Oneida Nation, 125 S.Ct. 1478(2005). (cbm,) (Entered: 09/15/2005)

Appendix A

10/27/2005 94 MEMORANDUM-DECISION & ORDER and PERMANENT INJUNCTION: that Madison County's motion to dismiss is DENIED; Oneida Indian Nation's motion for summary judgment is GRANTED; Madison County's cross-motion for summary judgment is DENIED; Madison County is permanently enjoined from any attempt to foreclose on Oneida Nation property or in any other way alter title to Oneida Indian Nation property; Madison County is permanently enjoined from assessing and/or collecting penalties & interest on unpaid taxes against the Oneida Indian Nation; & Oneida Indian Nation's reservation was not disestablished. Clerk is directed to enter judgment accordingly. Signed by Judge David N. Hurd on 10/27/2005. (see) (Entered: 10/27/2005)

10/27/2005 95 CIVIL JUDGMENT entered in accordance w/the 94 Memorandum-Decision & Order & Permanent Injunction of the Honorable David N. Hurd. (Attachments: # 1 Appeal Notice) (see) (Entered: 10/27/2005)

11/09/2005 98 First MOTION to Amend/Correct 97 Order, Set Deadlines Motion Hearing set for 1/30/2006 10:00 AM in Utica before Judge David N. Hurd. Response to Motion due by 1/13/2006 Reply to Response to Motion due by 1/19/2006 by Madison County. (Attachments: # 1 Memorandum of Law In Support of Defendant's Motion to Amend or Make Additional Findings, Alter or Amend Judgment, or for Relief from Judgment # 2 Supplement LEXIS case attached to Memorandum of Law # 3 Declaration of David M.

Schraver # 4 Exhibit(s) A to Schraver Dec. # 5 Exhibit(s) B to Schraver Dec. # 6 Exhibit(s) C to Schraver Dec. # 7 Exhibit(s) D to Schraver Dec. # 8 Exhibit(s) E to Schraver Dec. # 9 Exhibit(s) F to Schraver Dec. # 10 Exhibit(s) G to Schraver Dec. # 11 Exhibit(s) H to Schraver Dec. # 12 Exhibit(s) I to Schraver Dec. # 13 Exhibit(s) J-M to Schraver Dec. # 14 Exhibit(s) N to Schraver Dec. # 15 Exhibit(s) O"T to Schraver Dec. # 16 Exhibit(s) U-X to Schraver Dec. # 17 Affidavit of Paul W. Miller # 18 Supplement Certificate of Service)(Schraver, David)(Entered: 11/09/2005)

11/09/2005 99 AFFIDAVIT re 98 First MOTION to Amend/Correct 97 Order, Set Deadlines *Amended Affidavit of Paul W. Miller (with Exhibit A attached, which was inadvertently left out of previous filing)* by Madison County. (Schraver, David) (Entered: 11/09/2005)

11/23/2005 100 NOTICE OF APPEAL by Madison County. (Schraver, David) (Entered: 11/23/2005)

01/06/2006 111 RESPONSE in Opposition re 98 First MOTION to Amend/Correct 97 Order, Set Deadlines *Memorandum of Law in Opposition* filed by Oneida Indian Nation of New York, Oneida Indian Nation of New York. (Attachments: # 1 Declaration of Peter D. Carmen # 2 Exhibit(s) 1 to Carmen Dec. # 3 # 4 Exhibit(s) 1B to Carmen Dec. # 5 Exhibit(s) 1C to Carmen Dec. # 6 Exhibit(s) 1D to Carmen Dec. # 7 Exhibit(s) 1E to Carmen Dec. # 8 Exhibit(s) 1F to Carmen Dec. # 9 Exhibit(s) 2 to Carmen Dec. # 10

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Exhibit(s) 2A to Carmen Dec. # 11 Exhibit(s) 2B to Carmen Dec. # 12 Exhibit(s) 2C to Carmen Dec. # 13 Exhibit(s) 2D to Carmen Dec. # 14 Exhibit(s) 3 to Carmen Dec. # 15 Exhibit(s) 3A to Carmen Dec. # 16 Exhibit(s) 3B to Carmen Dec. # 17 Exhibit(s) 3c to Carmen Dec. # 18 Exhibit(s) 4 to Carmen Dec. # 19 Exhibit(s) 5 to Carmen Dec. # 20 Exhibit(s) 6 to Carmen Dec. # 21 Exhibit(s) 7 to Carmen Dec. # 22 Exhibit(s) 8 to Carmen Dec. # 23 Exhibit(s) 9 to Carmen Dec. # 24 Exhibit(s) 9A to Carmen Dec. # 25 Exhibit(s) 9B to Carmen Dec. # 26 Exhibit(s) 9C to Carmen Dec. # 27 Exhibit(s) 10 to Carmen Dec. # 28 Exhibit(s) 11 to Carmen Dec. # 29 Exhibit(s) 12 to Carmen Dec. # 30 Exhibit(s) 13 to Carmen Dec. # 31 Exhibit(s) 14 to Carmen Dec. # 32 Exhibit(s) 15 to Carmen Dec. # 33 Exhibit(s) 16 to Carmen Dec. # 34 Exhibit(s) 17 to Carmen Dec. # 35 Exhibit(s) 18 to Carmen Dec. # 36 Exhibit(s) 19 to Carmen Dec. # 37 Exhibit(s) 20 to Carmen Dec. # 38 Exhibit(s) 21 to Carmen Dec. # 39 Exhibit(s) 22 to Carmen Dec. # 40 Exhibit(s) 23 to Carmen Dec. # 41 Exhibit(s) 24 to Carmen Dec. # 42 Exhibit(s) 25 to Carmen Dec. # 43 Exhibit(s) 26 to Carmen Dec. # 44 Exhibit(s) 27 to Carmen Dec. # 45 Exhibit(s) 28 to Carmen Dec. # 46 Exhibit(s) 29 to Carmen Dec. # 47 Exhibit(s) 30 to Carmen Dec. # 48 Exhibit(s) 31 to Carmen Dec. # 49 Exhibit(s) 32 to Carmen Dec. # 50 Exhibit(s) 33 to Carmen Dec # 51 Exhibit(s) 34 to Carmen Dec. # 52 Exhibit(s) 35 to Carmen Dec. # 53 Exhibit(s) 36 to Carmen Dec. # 54 Exhibit(s) 37 to Carmen Dec. # 55 Exhibit(s) 38 to Carmen Dec. # 56 Exhibit(s) 39 to Carmen Dec. # 57 Exhibit(s) 40 to Carmen Dec. # 58 Exhibit(s) 41 to

Carmen Dec. # 59 Exhibit(s) 41A to Carmen Dec. # 60 Exhibit(s) 42 to Carmen Dec. # 61 Exhibit(s) 43 to Carmen Dec. # 62 Exhibit(s) 44 to Carmen Dec. # 63 Exhibit(s) 44A to Carmen Dec. # 64 Exhibit(s) 45 to Carmen Dec. # 65 Exhibit(s) 45A to Carmen Dec. # 66 Exhibit(s) 46 to Carmen Dec. # 67 Exhibit(s) 47 to Carmen Dec. # 68 Exhibit(s) 48 to Carmen Dec. # 69 Exhibit(s) 49 to Carmen Dec. # 70 Exhibit(s) 50 to Carmen Dec. # 71 Exhibit(s) 51 to Carmen Dec. # 72 Exhibit(s) 52 to Carmen Dec. # 73 Exhibit(s) 53 to Carmen Dec. # 74 Exhibit(s) 54 to Carmen Dec.)(Carmen, Peter) (Entered: 01/06/2006)

01/06/2006 112 AFFIDAVIT in Opposition re 98 First MOTION to Amend/Correct 97 Order, Set Deadlines *(pleading inadvertently omitted from earlier filing)* filed by Oneida Indian Nation of New York. (Attachments: # 1 Exhibit(s) 1 to Paul Thomas Affidavit # 2 Exhibit(s) 2 to Paul Thomas Affidavit)(Carmen, Peter)(Entered: 01/06/2006)

01/20/2006 117 MEMORANDUM OF LAW re 98 Motion to Amend/Correct, *Reply Memorandum of Law in Further Support of Defendant's Motion to Amend or Make Additional Findings, Alter or Amend Judgment, or For Relief From Judgment* filed by Madison County. (Attachments: # 1 Appendix Lexis cases cited (# 1) # 2 Appendix Lexis cases cited (# 2) #3 Appendix Certificate of Service)(Schraver, David) (Entered: 01/20/2006)

Appendix A

02/01/2006 120 Minute Entry for proceedings held before Judge David N. Hurd Motion Hearing held on 1/30/2006 in Utica, New York. (Court Reporter Nancy Freddoso) (cmr) (Entered: 02/01/2006)

06/02/2006 122 MEMORANDUM-DECISION & ORDER: that Madison County's motion to amend or make additional findings, alter or amend the judgment, or relief from the judgment filed on 10/27/2005 is DENIED; & Stockbridge-Munsee Band of Mohican Indians' motion to intervene is DENIED. Signed by Judge David N. Hurd on 6/2/2006. (see) (Entered: 06/02/2006)

06/08/2006 123 AMENDED NOTICE OF APPEAL *Amends 100 Appeal* by Madison County. (Attachments: # 1 Supplement Attached District Court's Memorandum-Decision and Order dated June 2, 2006)(Schraver, David)(Entered: 06/08/2006)

Appendix A

U.S. DISTRICT COURT NORTHERN DISTRICT OF NEW YORK ONEIDA INDIAN NATION V. ONEIDA COUNTY, CIVIL DOCKET FOR CASE # 6:05-CV-00945-DNH-GJD

07/27/2005 1 COMPLAINT against Oneida County, New York (Filing fee $ 250 receipt number UTC000406) filed by Peter Carmen, Esq. for Oneida Indian Nation. (see) (Entered: 07/27/2005)

08/29/2005 6 AMENDED ANSWER to *Complaint*, COUNTERCLAIM *and Demand For Jury Trial* against Oneida Indian Nation by Oneida County, New York. (Attachments: # 1 Supplement Certificate of Service)(Schraver, David) (Entered: 08/29/2005)

09/06/2005 7 ANSWER to Counterclaim, by Oneida Indian Nation. (Carmen, Peter) (Entered: 09/06/2005)

10/28/2005 8 Emergency MOTION for Temporary Restraining Order *and Preliminary Injunction* by Oneida Indian Nation. (Attachments: # 1 Memorandum of Law in Support of Application for Temporary Restraining Order and Preliminary Injunction # 2 Declaration of Peter D. Carmen # 3 Exhibit(s) A-1 to Carmen Dec. # 4 Exhibit(s) A-2 to Carmen Dec. # 5 Exhibit(s) A-3 to Carmen Dec. # 6 Exhibit(s) B to Carmen Dec. # 7 Exhibit(s) C to Carmen Dec. # 8 Exhibit(s) D to Carmen Dec. # 9 Exhibit(s) E to Carmen Dec. # 10 Exhibit(s) F to Carmen Dec. # 11 Proposed Order/Judgment regarding TRO)(Carmen, Peter) (Entered: 10/28/2005)

Appendix A

10/28/2005 9 TEMPORARY RESTRAINING ORDER: that Oneida County be & hereby is temporarily restrained & enjoined from undertaking any further efforts to effectuate, maintain or complete administrative or other foreclosures or to withdraw the right of redemption as to lands possessed by the Nation in Oneida County; that the application for a preliminary injunction be & hereby is set down for a hearing on Monday, 11/7/2005 at 02:00 PM in Utica before Judge David N. Hurd; that Oneida County shall electronically file & serve papers, if any, in opposition to the Nation's application for a preliminary injunction by no later than 12:00 noon on 11/4/2005, & reply papers will not be permitted. Signed by Judge David N. Hurd on 10/28/2005 at 4:00 pm. (see) (Entered: 10/28/2005)

12/09/2005 14 MOTION for Summary Judgment *by Oneida Indian Nation* Motion Hearing set for 1/30/2006 10:00 AM in Utica before Judge David N. Hurd. Response to Motion due by 1/13/2006 Reply to Response to Motion due by 1/19/2006 by Oneida Indian Nation. (Attachments: # 1 Memorandum of Law in Support of Motion for Summary Judgment # 2 Statement of Material Facts in Support of Motion for Summary Judgment # 3 Declaration of Paul Thomas # 4 Exhibit(s) 1 to Thomas Dec. # 5 Exhibit(s) 2 to Thomas Dec. # 6 Declaration of Peter D. Carmen in Support of Motion for Summary Judgment # 7 Exhibit(s) A to Carmen Dec. #8 Exhibit(s) B to Carmen Dec. # 9 Exhibit(s) C to Carmen Dec. # 10 Exhibit(s) D to Carmen Dec. # 11 Exhibit(s) E to Carmen Dec. # 12 Exhibit(s) F to Carmen Dec. # 13 Exhibit(s) G to Carmen Dec. # 14

Exhibit(s) H to Carmen Dec. # 15 Exhibit(s) I to Carmen Dec. # 16 Exhibit(s) J to Carmen Dec. # 17 Exhibit(s) K to Carmen Dec. # 18 Exhibit(s) L to Carmen Dec. # 19 Exhibit(s) M to Carmen Dec. # 20 Exhibit(s) N to Carmen Dec. # 21 Exhibit(s) O to Carmen Dec. # 22 Exhibit(s) P to Carmen Dec. # 23 Exhibit(s) Q to Carmen Dec. # 24 Exhibit(s) R to Carmen Dec. # 25 Exhibit(s) S to Carmen Dec.)(Carmen, Peter) (Entered: 12/09/2005)

01/06/2006 23 MOTION for Summary Judgment *Cross-Motion* Motion Hearing set for 1/30/2006 10:00 AM in Utica before Judge David N. Hurd. Response to Motion due by 1/13/2006 Reply to Response to Motion due by 1/19/2006 by Oneida County, New York. (Attachments: # 1 Memorandum of Law In Support of Cross-Motion for Summary Judgment # 2 Exhibit(s) A to Memorandum of Law # 3 Supplement Lexis cases to Memorandum of Law # 4 Statement of Material Facts In Support of Defendant's Cross-Motion for Summary Judgment # 5 Statement of Material Facts Defendant's Response to Plaintiff's Statement of Undisputed Facts # 6 Declaration of David M. Schraver # 7 Exhibit(s) I to Schraver Decl. # 8 Exhibit(s) I to Schraver Decl. (continued) # 9 Exhibit(s) I to Schraver Decl. (continued) # 10 Exhibit(s) I to Schraver Decl. (continued) # 11 Exhibit(s) I to Schraver Decl. (continued) # 12 Exhibit(s) I to Schraver Decl. (continued) # 13 Exhibit(s) I to Schraver Decl. (continued) # 14 Exhibit(s) I to Schraver Decl. (continued) # 15 Exhibit(s) I to Schraver Decl. (continued) # l6 Exhibit(s) II to Schraver Decl. # 17 Exhibit(s) III to Schraver Decl.

18 Exhibit(s) III to Schraver Decl. (continued) # 19 Exhibit(s) III to Schraver Decl. (continued) # 20 Exhibit(s) III to Schraver Decl. (continued) # 21 Exhibit(s) III to Schraver Decl. (continued) # 22 Exhibit(s) III to Schraver Decl. (continued) # 23 Exhibit(s) III to Schraver Decl. (continued) # 24 Exhibit(s) III to Schraver Decl. (continued) # 25 Exhibit(s) III to Schraver Decl. (continued) # 26 Exhibit(s) III to Schraver Decl. (continued) # 27 Exhibit(s) IV to Schraver Decl. # 28 Exhibit(s) IV to Schraver Decl. (continued) # 29 Exhibit(s) IV to Schraver Decl. (continued) # 30 Exhibit(s) IV to Schraver Decl. (continued) # 31 Exhibit(s) IV to Schraver Decl. (continued) # 32 Exhibit(s) IV to Schraver Decl. (continued) # 33 Exhibit(s) IV to Schraver Decl. (continued) # 34 Exhibit(s) IV to Schraver Decl. (continued) # 35 Exhibit(s) IV to Schraver Decl. (continued) # 36 Exhibit(s) IV to Schraver Decl. (continued) # 37 Exhibit(s) V-VII to Schraver Decl. # 38 Exhibit(s) VIII-IX to Schraver Decl. # 39 Affidavit of Mikale P. Billard # 40 Affidavit Affidavit of Regularity of Daniel Yerdon # 41 Exhibit(s) A-B to Affidavit of Regularity # 42 Exhibit(s) B to Affidavit of Regularity (continued) # 43 Exhibit(s) C to Affidavit of Regularity # 44 Exhibit(s) D to Affidavit of Regularity # 45 Exhibit(s) D to Affidavit of Regularity (continued) # 46 Exhibit(s) E to Affidavit of Regularity # 47 Affidavit of Anthony Carvelli)(Schraver, David) (Entered: 01/06/2006)

01/06/2006 25 MEMORANDUM OF LAW *of Amicus State of NY relating to Summary Judgment*

Appendix A

Motions of OIN and Oneida Co filed by State of New York. (Attachments: # 1 Affirmation of AAG David Roberts # 2 Exhibit(s) A# 3 Exhibit(s) B# 4 Exhibit(s) C#5 Exhibit(s) D# 6 Affirmation of Service) (Roberts, David) (Entered: 01/06/2006)

01/20/2006 28 MEMORANDUM OF LAW re 26 Memorandum of Law, 27 LETTER BRIEF, 12 Motion to Intervene, 3 Amended Document, Set Motion and R&R Deadlines/Hearings filed by Oneida Indian Nation. (Attachments: # 1 Supplement Letter to Judge Hurd # 2 Declaration of Peter D. Carmen # 3 Exhibit(s) A to Carmen Dec. # 4 Exhibit(s) B to Carmen Dec. #5 Exhibit(s) C to Carmen Dec. # 6 Exhibit(s) D to Carmen Dec. # 7 Exhibit(s) E to Carmen Dec. # 8 Exhibit(s) F to Carmen Dec. # 9 Exhibit(s) G to Carmen Dec. # 10 Exhibit(s) H to Carmen Dec. # 11 Exhibit(s) I to Carmen Dec. # 12 Exhibit(s) J to Carmen Dec. # 13 Exhibit(s) K to Carmen Dec. # 14 Exhibit(s) L to Carmen Dec. # 15 Exhibit(s) M to Carmen Dec. # 16 Exhibit(s) N to Carmen Dec. # 17 Exhibit(s) O to Carmen Dec. # 18 Exhibit(s) P to Carmen Dec. # 19 Exhibit(s) Q to Carmen Dec. # 20 Exhibit(s) R to Carmen Dec. # 21 Exhibit(s) S to Carmen Dec. # 22 Exhibit(s) T to Carmen Dec. # 23 Exhibit(s) U # 24 Exhibit(s) V to Carmen Dec. # 25 Exhibit(s) W to Carmen Dec. # 26 Exhibit(s) X to Carmen Dec. # 27 Exhibit(s) Y to Carmen Dec. # 28 Exhibit(s) Z to Carmen Dec. # 29 Exhibit(s) AA to Carmen Dec. # 30 Affidavit of Service)(Carmen, Peter) (Entered: 01/20/2006)

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01/20/2006 30 Reply MEMORANDUM OF LAW in Opposition to 23 Cross-Motion for Summary Judgment & in further Support of the 14 Motion for Summary Judgment filed by Oneida Indian Nation. (Attachments: # 1 Declaration of Hugh Lordon # 2 Statement of Material Facts Response # 3 Declaration of Peter D. Carmen # 4 Exhibit(s) 1 to Carmen Dec. # 5 Exhibit(s) 2 to Carmen Dec. #6 Exhibit(s) 3 to Carmen Dec. # 7 Exhibit(s) 4 to Carmen Dec. # 8 Exhibit(s) 5 to Carmen Dec. # 9 Exhibit(s) 6 to Carmen Dec. # 10 Exhibit(s) 7 to Carmen Dec. # 11 Exhibit(s) 8 to Carmen Dec. # 12 Exhibit(s) 10 to Carmen Dec. # 13 Exhibit(s) 11 to Carmen Dec. # 14 Exhibit(s) 12 to Carmen Dec. # 15 Exhibit(s) 14 to Carmen Dec. # 16 Exhibit(s) 15 to Carmen Dec. # 17 Exhibit(s) 15-A to Carmen Dec. # 18 Exhibit(s) 15-B to Carmen Dec. # 19 Exhibit(s) 16 to Carmen Dec. # 20 Exhibit(s) 17 to Carmen Dec. # 21 Exhibit(s) 18 to Carmen Dec. # 22 Exhibit(s) 18-A to Carmen Dec. # 23 Exhibit(s) 19 to Carmen Dec. # 24 Exhibit(s) 20 to Carmen Dec. # 25 Exhibit(s) 21 to Carmen Dec. # 26 Exhibit(s) 22 to Carmen Dec. # 27 Exhibit(s) 23 to Carmen Dec. # 28 Exhibit(s) 24 to Carmen Dec. # 29 Exhibit(s) 25 to Carmen Dec. # 30 Exhibit(s) 26 to Carmen Dec. # 31 Exhibit(s) 27 to Carmen Dec. # 32 Exhibit(s) 28 to Carmen Dec. # 33 Exhibit(s) 29 to Carmen Dec. # 34 Exhibit(s) 30 to Carmen Dec. # 35 Exhibit(s) 31 to Carmen Dec. # 36 Exhibit(s) 32 to Carmen Dec. # 37 Exhibit(s) 33 to Carmen Dec. # 38 Exhibit(s) 33-A to Carmen Dec. # 39 Exhibit(s) 34 to Carmen Dec. # 40 Exhibit (s) 34-A to Carmen Dec. # 41 Exhibit(s) 35 to Carmen Dec. # 42 Exhibit(s) 36 to Carmen Dec. # 43 Exhibit(s) 37 to

Carmen Dec. # 44 Exhibit(s) 38 to Carmen Dec. # 45 Exhibit(s) 39 to Carmen Dec. # 46 Exhibit(s) 40 to Carmen Dec.)(Carmen, Peter) (Entered: 01/20/2006)

02/01/2006 32 Minute Entry for proceedings held before Judge David N. Hurd: Motion Hearing held on 1/30/2006 in Utica, New York. (Court Reporter Nancy Freddoso) (cmr) (Entered: 02/01/2006)

06/02/2006 34 MEMORANDUM-DECISION & ORDER & PERMANENT INJUNCTION: that the Oneida Indian Nation's motion for summary judgment is GRANTED; Oneida County's cross-motion for summary judgment is DENIED; the motion by the Stockbridge-Munsee Band of Mohican Indians to intervene is DENIED; Oneida County is permanently enjoined from any attempt to foreclose on Oneida Indian Nation property or in any other way alter title to Oneida Indian Nation property; Oneida County is permanently enjoined from assessing &/or collecting penalties & interest on unpaid taxes prior to March 29, 2005, against the Oneida Indian Nation; & Oneida Indian Nation's reservation was not disestablished. The Clerk of the Court is directed to enter judgment accordingly. Signed by Judge David N. Hurd on 6/2/2006. (see) (Entered: 06/02/2006)

06/02/2006 35 JUDGMENT entered in accordance w/the 34 MDO & Permanent Injunction by the Honorable David N. Hurd. (Attachments: # 1 Appeal Notice) (see) (Entered: 06/02/2006)

06/09/2006 36 MOTION to Alter Judgment *ON SUBMIT (pursuant to Local Rule 7.1(g);* Motion Hearing set for 7/14/2006 10:00 AM in Utica before Judge David N. Hurd. Response to Motion due by 6/27/2006 Reply to Response to Motion due by 7/3/2006 by Oneida Indian Nation. (Attachments: # 1 Memorandum of Law in support of motion pursuant to Rule 59 to alter judgment # 2 Declaration of Peter D. Carmen # 3 Exhibit(s) A to Carmen Dec. # 4 Exhibit(s) B to Carmen Dec. # 5 Exhibit(s) C to Carmen Dec. # 6 Exhibit(s) D to Carmen Dec. # 7 Exhibit(s) E to Carmen Dec. # 8 Exhibit(s) F to Carmen Dec. # 9 Exhibit(s) G to Carmen Dec. # 10 Exhibit(s) H to Carmen Dec. # 11 Exhibit(s) I to Carmen Dec. # 12 Exhibit(s) J to Carmen Dec.) (Carmen, Peter) (Entered: 06/09/2006)

06/26/2006 37 MEMORANDUM OF LAW re 36 Motion to Alter Judgment, *In Opposition to Plaintiff's Motion Pursuant to Rule 59 to Alter or Amend Judgment* filed by Oneida County, New York. (Attachments: # 1 Supplement Attachment to Memorandum of Law - Westlaw cases cited in Memorandum # 2 Affirmation Declaration of David M. Schraver in Opposition to Plaintiff's Rule 59 Motion to Alter or Amend Judgment # 3 Exhibit(s) I to Declaration of David M. Schraver - Complaint Filed by Oneida Indian Nation of New York on July 27, 2005)(Schraver, David)(Entered: 06/26/2006)

07/02/2006 38 REPLY to Response to Motion re 36 MOTION to Alter Judgment *ON SUBMIT (pursuant to Local Rule 7.1(g); memorandum of law*

filed by Oneida Indian Nation. (Carmen, Peter) (Entered: 07/02/2006)

11/02/2006 41 ORDER granting pltf's 36 Motion to Alter & Amend the Judgment; & the judgment is amended to provide that "Oneida County is permanently enjoined from assessing &/or collecting penalties & interest on unpaid taxes against the Oneida Indian Nation". The Clerk of the Court is directed to enter an amended judgment accordingly. Signed by Judge David N. Hurd on 11/2/2006. (see) (Entered: 11/02/2006)

11/02/2006 42 AMENDED JUDGMENT filed in accordance w/the 41 Order of the Honorable David N. Hurd. (see) (Entered: 11/02/2006)

11/07/2006 43 NOTICE OF APPEAL as to 42 Judgment, 41 Order on Motion to Alter Judgment, by Oneida County, New York. (Schraver, David) (Entered: 11/07/2006)

Appendix A

GENERAL DOCKET OF THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT ONEIDA INDIAN NATION V. MADISON COUNTY, DOCKET FOR CASE NO. 05-6408-CV

6/13/06 Copy of District Court Docket entries and AMENDED NOTICE OF APPEAL on behalf of APPELLANT Madison County, filed. [Entry date Jun 15 2006] [JC]

1/19/07 APPELLANT Madison County, Oneida County, New York, brief FILED with proof of service. [Entry date Jan 24 2007] [JC]

1/26/07 AMICUS CURIAE State of New York, brief filed with proof of service. [Entry date Feb 1 2007] [JC]

4/9/07 APPELLEE Oneida Indian Nation of New York, brief filed with proof of service. [Entry date Apr 10 2007] [JC]

4/30/07 APPELLANT Madison County, Oneida County, New York, reply brief filed with proof of service. [Entry date May 3 2007] [JC]

11/6/07 Case heard before CABRANES, SACK, HALL, C.JJ. [Entry date Nov 6 2007] [JC]

11/29/07 Order filed stating The Solicitor General of the United States is hereby ORDERED to submit a brief as amicus curiae stating the position of the United

States Government on the captioned case, addressing at a minimum the following questions: (1) whether, in the Government subject to foreclosure for nonpayment of local real property tax in light of the United States Supreme Court *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) and notwithstanding the Appellee Indian tribe, from suit, see, e.g., Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 754 (1998) (law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity whether and when and if so, under what conditions, the U.S. Department of the Interior intends to decide the pending application to take the subject land into trust for the Oneida Indian Nation and whether the Government thinks it is advisable for this Court to suspend its consideration of this appeal until that decision is made; (3) whether the pending claim by the Stockbridge-Munsee Community on a portion of the land in question renders the Stockbridge-Munsee Community an indispensable party to this action; and (4) any other issue the Government wishes to raise to the Court in this action. It is expected that the Solicitor General will consult with the Department of the Interior in this matter. The Clerk shall make available to the Solicitor General the briefs and appendices in this case. The brief shall be submitted to the Court not later than January 6, 2008. Counsel of record shall respond to the Solicitor General after the filing of the Solicitor General brief. (Before: JAC, RDS, PWH, C.JJ., by: Catherine O'Hagan Wolfe, Clerk) [Entry date Nov 29 2007] [AM]

4/1/08 Order filed stating consideration of the appeal is STAYED until June 30, 2008 or until United

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States Department of the Interior renders its final decision regarding the application by the Oneida Indian Nation to place its land into trust, whichever is earlier. The parties shall submit supplemental letter briefs, with a status report and arguments on the merits, by no later than thirty days after the expiration of this deadline; the letter briefs shall be no longer than 10 double-spaced pages. (Before: JAC, RDS, PWH, C.J.J,. by: FP) [Entry date Apr 1 2008] [AM]

5/29/08 Copy of United States Department of the Interior Record of Decision from Kathryn E. Kovacs, Esq. for the U.S. Dept. of Justice received. [Entry date May 30 2008 [AM]

6/19/08 APPELLANT Madison County, Oneida County, New York, supplemental papers as per the 4/1/08 order, filed. (Entry date Jun 20 2008] [EM]

6/19/08 APPELLANT Madison County, Oneida County, New York, supplemental papers in support of their letter filed 6/19/08, filed. [Entry date Jun 20 2008] [EM]

6/19/08 APPELLEE Oneida Indian Nation of New York, supplemental papers per the 4/1/08 order, filed. [Entry date Jun 20 2008] [EM]

7/25/08 AMICUS CURIAE United States of America, brief filed with proof of service. [Entry date Jul 28 2008] [EM]

Appendix A

4/27/10 OPINION, judgment of the district court is affirmed, by JAC, RDS, PWH, FILED. [Entry date Apr 27 2010] [ML]

4/27/10 OPINION, concurring, by Judge Cabranes with whom Judge Hall joins, FILED. [Entry date Apr 27 2010] [ML]

4/27/10 JUDGMENT, FILED. [Entry date Apr 27 2010] [ML]

APPENDIX B — DECLARATION OF HUGH C. LORDON IN *ONEIDA INDIAN NATION V. ONEIDA COUNTY*, NO. 6:05-CV-0945 (N.D.N.Y.), DATED JANUARY 19, 2006

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action No. 6:05-CV-0945 (DNH/GJD)

Oneida Indian Nation,

Plaintiff,

v.

Oneida County, New York,

Defendant.

DECLARATION OF HUGH C. LORDON

Hugh C. Lordon, under penalty of perjury, declares:

1. I am the Chief Administrative Officer for the Oneida Indian Nation of New York (the "Nation"). I have held this position, and my previous position as the Nation's Chief Financial Officer, since 2001. I am familiar with the Nation's Silver Covenant Chain program and with the Silver Covenant Chain and other payments made by the Nation with respect to Oneida County. Prior to assuming my current position, I served for nine years as the Central New York district president of KeyBank,

a federally-chartered bank in Syracuse, New York. Based on my current role with the Nation and my former role as a banker and businessman in this region, I also am fully familiar with the effect of the Nation's enterprises on the Central New York business community and the economy of the region.

2. Starting in 1996, the Nation made Silver Covenant Chain payments within Oneida County. These payments were first given in January 1996 and continued through April 2005.

3. Although the County has filed affidavits saying that it seeks to collect about $3.5 million in unpaid taxes and about $1.5 million in penalties, interest and other charges, the total amount of the Nation's Silver Covenant Chain payments in Oneida County is $5,013,470.17. Of this amount, $4,156,421.66 was paid to the Vernon-Verona-Sherrill Central School District, $569,384.21 was paid to the Town of Verona, and $287,214.20 was paid to Oneida County. The Nation would have paid more, but the County would not accept the payments.

4. The Nation's Silver Covenant Chain payments in Oneida County have increased over the years. In 1996, the Nation paid $120,279.90 to the Vernon-Verona-Sherrill Central School District. By 2004, the Nation made $915,261.58 in Silver Covenant Chain payments in the County, including $684,311.50 to the School District.

5. In October 2005, the Nation made a further payment of $298,364.17 to the Vernon-Verona-Sherrill Central School District in connection with September 2005 school tax bills. This payment was consistent with the amounts billed on the school tax bills, except with respect to the Nation properties that are part of or used to support the Turning Stone Resort & Casino, which are over-assessed.

6. The Nation has made substantial investments in County infrastructure in addition to the Silver Covenant Chain payments.

7. For example, in 1992, the Nation made a $300,000 gift to the Town of Verona (in Oneida County), which the Town used to add on to the existing town hall and to replace the heating system.

8. In the mid-1990s, the Nation invested $7 million to build a new water line from the border of the City of Oneida (in Madison County) to the Turning Stone Resort & Casino in the Town of Verona, serving other parts of the Town along Route 365. The system was deeded to the Town of Verona. The Nation also invested $1 million to build a new water tower to feed the new water line along Route 365. Also in the mid-1990s, the Nation paid $160,000 for the Town of Verona to develop an updated master plan.

9. Between 2002 and 2004, working in concert with the Town of Verona, the Nation spent $1.1 million in engineering and other costs in an effort to design a new water line for an additional water source for the Town.

10. The Nation also has contracted to pay almost $1.3 million for the upgrade and improvement of the City of Oneida's sewer plant, which serves the Town of Verona and the Turning Stone Resort & Casino in the Town of Verona.

11. Between 1993 and the present, the Nation has paid almost $600,000 in fees for services to the Verona Volunteer Fire District No. 3, which protects the Turning Stone Resort & Casino and other Nation properties in the Town of Verona.

12. The Nation's more than $5 million in Silver Covenant Chain payments in Oneida County, together with these other multi-million dollar investments in the County's public works, substantially exceed the unpaid taxes claimed by the County. Excluding interest and penalties (upon which the County does not set its budget), Oneida County seeks approximately $3.5 million in property taxes from the Nation, according to the Affidavit of Anthony Carvelli filed in this action and dated January 6, 2006. This figure does not include amounts reflected on the January 2006 tax bills, which the Nation just received this month.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 19, 2006.

/s/

Hugh C. Lordon

APPENDIX C — AFFIDAVIT OF ANTHONY CARVELLI IN *ONEIDA INDIAN NATION V. ONEIDA COUNTY*, NO. 6:05-CV-0945 (N.D.N.Y.), DATED JANUARY 6, 2006

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

No. 6:05-CV-0945
(DNH/GJD)

ONEIDA INDIAN NATION,

Plaintiff,

-vs-

ONEIDA COUNTY, NEW YORK,

Defendant.

STATE OF NEW YORK)
) ss.:
COUNTY OF MADISON)

AFFIDAVIT OF ANTHONY CARVELLI

ANTHONY CARVELLI, being duly sworn, deposes and says:

1. I am the duly appointed Commissioner of Finance for the County of Oneida, State of New York. I am over 18 years of age and am competent to make this Affidavit. I have personal knowledge of the statements made

herein and make this Affidavit in opposition to the Plaintiff's motion for summary judgment and in support of Oneida County's cross-motion for summary judgment.

2. The Oneida Indian Nation of New York owns various parcels of real estate within the County of Oneida and State of New York.

3. As of January 1, 2006, there were unpaid real property taxes, inclusive of the 2006 real property taxes, levied by Oneida County against properties owned by the Oneida Indian Nation of New York in the amount of approximately $26,217,585.05.

4. The above sum includes unpaid taxes on the 2006 tax roll in the amount of $21,182,305.90. Recognizing that under the statutes and thus accounted as described under the New York State Comptroller's Uniform System of Accounts, unpaid interest as it accrues is included in and becomes part of the previous year's unpaid tax as each warrant year rolls forward, this notwithstanding, I have determined to the best of my ability at this time that unpaid taxes for the years 1994 through and including 2005 are $3,485,426.87, county interest, fees, advertising and search charges impute to a proximate of $1,373,580.34 and county 5% late penalty is calculated at $174,271.94.

5. This sum does not reflect the $650,000 non-refundable good faith payment made by the Oneida Indian Nation to the County of Oneida pursuant to an Agreement dated August 1, 2005. According to the

terms of this Agreement, if the Nation were to redeem the outstanding taxes on certain parcels (59) owned by it, said payment would be credited against the outstanding tax liability. A copy of said Agreement is attached as Exhibit A.

6. Your affiant submits this Affidavit as a true and accurate representation of the tax liability owed by the Oneida Indian Nation to the County of Oneida as of January 1, 2006.

WHEREFORE, it is respectfully submitted that the relief requested by the Oneida Indian Nation of New York be denied.

/s/
Anthony Carvelli
Commissioner of Finance

Sworn to before me this 6th day of January, 2006

/s/
Kathy M. Pilbeam
Notary Public—Oneida County, NY
My Commission Expires: 6/29/06

APPENDIX D — AFFIDAVIT OF MIKALE P. BILLARD IN *ONEIDA INDIAN NATION V. ONEIDA COUNTY*, NO. 6:05-CV-0945 (N.D.N.Y.), DATED JANUARY 5, 2006

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action No.
6:05-CV-0945
(DNH/GJD)

ONEIDA INDIAN NATION,

Plaintiff,

-vs-

ONEIDA COUNTY, NEW YORK,

Defendant.

STATE OF NEW YORK:
COUNTY OF ONEIDA : ss.

AFFIDAVIT OF MIKALE P. BILLARD

The undersigned, Mikale P. Billard, being duly sworn, deposes and says as follows:

1. I am a lifetime resident of Oneida County, New York and, since January, 2000, have been Majority Legislative Analyst for Oneida County.

2. I make this affidavit in opposition to Plaintiff's Motion for Summary Judgment in this action and to introduce certain items into the record.

3. I make this affidavit based on my personal knowledge, my review of Oneida County documents and such investigation as I deemed necessary.

4. The subject parcels were last possessed by the former Oneida Nation as a tribal entity in approximately 1843, having been the subject of treaties or transactions between the former Oneida Nation and the State of New York in 1788, 1795, 1802, 1807, 1809, 1810, 1811, 1815, 1817, 1824, 1827, 1829, 1833, 1834, 1840, 1841 and 1842 (and as to the Stockbridge-Munsee lands, transactions between the Stockbridge and the State of New York in 1819, 1820, 1823 and 1826).

5. The subject parcels were purchased by the Oneida Nation beginning in approximately 1993.

6. Since at least the middle of the 19th century, governmental and regulatory authority has been exercised over Oneida County by New York State, Oneida County, and towns and other local government units within Oneida County.

7. On December 14, 2005, the Oneidas submitted a check in the sum of $314,407.83 as and for redemption of six (6) tax parcels 323.000-1-1.3, 323.000-1-2, 323.000-1-2.1, 323.000-2-19, 322.000-2-28, 322.000-1-30, which parcels are not the subject of the instant proceeding.

8. The Oneida Indian Nation of New York's failure to pay real property taxes on the sixty-two (62) parcels that are the subject of this proceeding, as well as Oneida Indian Nation's remaining 217 parcels, has created an undue burden upon Oneida County and has unduly shifted the tax burden to other taxpayers in the County.

9. This loss of the real property tax revenue the County would have realized if the Oneida Indian Nation paid their real property taxes has caused the County to cut funding to several cultural agencies, to wit: libraries, Stanley Theater and Stevens-Swan Humane Society, etc.

10. The loss of revenue has also caused the County to forego highway repairs and/or improvements.

11. Attached as Exhibit "A" is a map prepared by Oneida County dated January 3, 2006 showing Oneida Indian Nation properties including the 62 parcels which are the subject of this proceeding and the 6 parcels depicted in red which the Oneidas have chosen to redeem.

12. The taxes, penalties and statutory costs due on the 62 parcels remain unpaid as of January 5, 2006.

Appendix D

/s/
Mikale P. Billard

Sworn to before me this 5th day of January, 2006

/s/
Randal B. Caldwell
Notary Public
Commission expires 7/18/06

APPENDIX E — COMPACT DATED OCTOBER 4, 2005

COMPACT

WHEREAS the City of Sherrill (the "City") is a political subdivision of the State of New York organized as a city with all the rights and powers attendant thereto;

WHEREAS the Oneida Indian Nation of New York (the "Nation") is a federally-recognized Indian tribe with all the rights and powers attendant thereto;

WHEREAS the City and the Nation have had disputes with respect to certain real property taxation and health and safety regulatory issues, including disputes that have resulted in state and federal litigation;

WHEREAS the United States Supreme Court decided *City of Sherrill v. Oneida Indian Nation,* 125 S.Ct. 1478 (2005), on March 29, 2005; and

WHEREAS the City and the Nation share an interest in resolving the disputes between them and in promoting cooperation between them that will promote the general welfare with respect to issues involving public finance, health and safety;

NOW, THEREFORE, the City and the Nation make this compact (the "Compact") and agree to the following terms.

Appendix E

1. The City has submitted real property tax bills to the Nation, from 1997 to the present, in amounts totaling $59,814.07, exclusive of interest and penalties. Upon execution of this agreement by both parties, the Nation will pay the City an amount that equals or exceeds $59,814.07, and the City will waive any further demand as to principal, penalties or interest with respect to previous property tax bills and will remove any tax liens that may be on the Nation's properties.

2. With respect to future real property tax assessments during the life of this Compact and concerning land within the City that is owned by the Nation, and not otherwise, the Nation agrees to forego arguments that its lands in the City have no taxable value under state law because of federal restrictions on alienation or for any other reasons relating to the Nation's status as a federally-recognized Indian Tribe, except for discrimination. The City agrees that otherwise the Nation is entitled to make all other legal challenges to future real property tax assessments.

3. With respect to future real property tax bills for properties owned by the Nation in the City, the Nation will pay the City amounts that equal or exceed the amounts shown on the bills. These payments will be made on or before the due date shown on the bill. Upon receipt of such payments, the City will waive any demand for further payment as to the property tax bills to which the Nation's payments relate.

4. The Nation agrees to meet or exceed all health, safety, zoning and signage standards and regulations

generally applicable to properties within the City and that the City may conduct such site visits and testing as reasonably required to determine that such standards have been met or exceeded. With respect to zoning, existing non-conforming uses, if any, will not be deemed a violation of this Compact.

5. The City agrees that it will give the Nation reasonable notice of any request for site visits and testing, and the Nation agrees to permit such site visits and testing within a reasonable time. In a health or safety emergency, reasonable notice will consist of telephone or radio notice to the Nation police dispatcher immediately prior to or en route to a visit, if possible. Nation health and safety or other officials may accompany City officials or employees during any site visit. Further, Nation and City officials will, as appropriate, consult and cooperate regarding public health and safety issues of mutual concern.

6. The City acknowledges that the Nation and the United States Indian Health Service, a federal agency, inspects Nation properties and agrees that this Compact does not limit the right of the Nation or the Indian Health Service to do such inspections.

7. The City and the Nation agree to dismiss without prejudice all litigation now pending between them in any court.

8. The City and the Nation agree to binding arbitration to enforce the terms of this agreement. Any

dispute, controversy or claim arising out of this Compact in whole or in part, including without limitation any claim of violation resulting from the site visits and/or testing referred to in paragraphs 4 and 5 above, shall be resolved by arbitration, and any resulting award will be enforceable in the United States District Court for the Northern District of New York. The party seeking arbitration will serve upon the other a notice of demand to arbitrate. The demand must describe with particularity the nature of the dispute and the relief that the demanding party seeks. Representatives of the City and the Nation will meet and confer within ten (10) calendar days of the receipt of the arbitration demand and will attempt in good faith to resolve the dispute. If the dispute has not been resolved within twenty (20) calendar days of the service of the arbitration demand, the dispute will be determined by arbitration by a single arbitrator, and the arbitration will be pursuant to the rules of the American Arbitration Association. The cost of arbitration will be paid by the losing party unless the arbitrator's decision specifies otherwise, but the parties will bear their own costs and attorneys' fees. Arbitration shall occur in the City of Sherrill unless the parties agree otherwise.

9. This Compact does not apply with respect to any land that is taken into trust by the United States for the benefit of the Nation or set aside by the United States for the Nation by or pursuant to federal statute.

10. Any party to this Compact may withdraw from it effective September 1, 2010, by giving ninety (90) days prior notice of intent to withdraw. In the event no such

notice is given, the Compact shall be automatically renewed for successive five (5) year terms.

11. The City and the Nation waive any immunities they may have, including sovereign immunity, for the sole purpose of enforcing the terms of this Compact by a party to this Compact pursuant to the enforcement provisions herein, and for no other purpose, and no other or third party has any rights on account of this waiver or under this Compact.

12. Any term of this Compact that may be invalid or unenforceable will be severed, and the remainder of this Compact will be enforced.

13. Notice required by or related to this Compact will be made in writing and served by FedEx or certified mail, return receipt requested: if by the Nation, to the Mayor of the City of Sherrill, 377 Sherrill Road, Sherrill NY 13461; and, if by the City, to the Oneida Indian Nation Representative, 5218 Patrick Road, Verona, NY 13478.

14. This Compact constitutes the parties' complete agreement and is an integrated document. There are no other agreements, oral or written.

15. This Compact may not be modified or amended except by a writing of equal formality signed by both parties.

Appendix E

Made this *4th* day of October, 2005.

Oneida Indian Nation of New York

By: /s/
Ray Halbritter
Nation Representative

City of Sherrill, New York

By: /s/
Joseph P. Shay
Mayor

APPENDIX F — AFFIDAVIT OF ROCCO J. DIVERONICA IN *ONEIDA INDIAN NATION V. MADISON COUNTY*, NO. 5:00-CV-0506 (N.D.N.Y.), DATED AUGUST 3, 2005

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action No. 00-CV-506
(DNH/GJD)

ONEIDA INDIAN NATION,

Plaintiff,

- vs -

MADISON COUNTY, NEW YORK,

Defendant.

STATE OF NEW YORK:
COUNTY OF MADISON : ss.

AFFIDAVIT OF ROCCO J. DIVERONICA

The undersigned, Rocco J. DiVeronica, being duly sworn, deposes and says as follows:

1. I am a lifelong resident of Madison County, New York and, since January 4, 2000, have been Chairman of the Board of Supervisors of Madison County.

2. I make this affidavit in support of Defendant's Cross-Motion for Summary Judgment in this action and to introduce certain items into the record.

3. I make this affidavit based on my personal knowledge, my review of Madison County documents and such investigation as I deemed necessary.

4. The 98 parcels of land in question in this action were last possessed by the former Oneida Nation (prior to being purchased by plaintiff since 1994) in approximately 1843, having variously been the subject of treaties or transactions between the former Oneida Nation and the State of New York in 1788, 1795, 1802, 1807, 1810, 1811, 1817, 1824, 1827, 1829, 1840, 1841 and 1842 (and as to the Stockbridge-Munsee lands, transactions between the Stockbridge and the State of New York in 1819, 1820, 1823 and 1826) and, as to any remaining Oneida properties held communally, transferred pursuant to an 1843 act of the New York Legislature to be held in severalty.

5. Since at least the middle of the 19th century, governmental and regulatory authority has been exercised over Madison County by New York State, Madison County, and towns and other local government units within Madison County.

6. The taxes, interest, penalties and statutory costs due on the 98 parcels remain unpaid as of August 3, 2005.

7. Attached as Exhibit A is a map prepared by Madison County dated August 3, 2005 showing Oneida Indian Nation properties (outside the City of Oneida) with delinquent Madison County taxes as of January 1, 1998.

8. Attached as Exhibit B is a map prepared by Madison County dated August 3, 2005 showing Tax Status of Oneida Indian Nation of New York properties in Madison and Oneida Counties as of January 1, 2005.

9. At a meeting in Madison County on April 22, 2005, representatives of the United States Department of Interior and Bureau of Indian Affairs advised representatives of Madison and Oneida Counties and the State of New York that whatever "applications" plaintiff has filed to have the United States accept lands into trust were incomplete. Madison County has never received notice that the "applications" are complete.

/s/
Rocco J. DiVeronica

Sworn to before me this 3rd day of August, 2005

/s/
Notary Public,
Susan I. Frank,
Commission expires Oct. 27, 2006

APPENDIX G — ONEIDA INDIAN NATION'S COMPLAINT IN *ONEIDA INDIAN NATION V. ONEIDA COUNTY*, NO. 6:05-CV-0945 (N.D.N.Y.), FILED JULY 27, 2005

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action No. 05-CV-0945

ONEIDA INDIAN NATION
Route 5
Vernon, New York 13476,

Plaintiff,

-vs-

ONEIDA COUNTY, NEW YORK
Oneida County Office Building
800 Park Avenue
Utica, New York 13501,

Defendant.

COMPLAINT

A. *Nature of Action*

1. The Oneida Indian Nation (the "Nation") brings this action against Oneida County to stop the County from enforcing its real property tax laws by efforts to foreclose on, convey and remove the Nation from lands located in Oneida County. The County's efforts violate

federal law regarding due process, restraints on alienation of the lands of Indian tribes and the sovereign immunity of Indian tribes themselves.

B. *Jurisdiction and Venue*

2. Jurisdiction as to the Nation's federal claims exists pursuant to 28 U.S.C. §§ 1331 & 1362. Those claims arise under, and seek to preserve rights and immunities secured by, the Indian Commerce Clause (art. I, § 8) and the Due Process Clause (amend. XIV) of the United States Constitution, the Nonintercourse Act, 25 U.S.C. § 177, the 1794 Treaty of Canandaigua and federal common law.

3. Jurisdiction as to the Nation's state-law due process claim exists pursuant to 28 U.S.C. § 1367.

4. The Northern District of New York is an appropriate venue pursuant to 28 U.S.C. § 1391(b). Oneida County and its officials, agents and employees are in this district. All of the events giving rise to the Nation's claims occurred in this district. The real property that is the subject of this action is in this district.

C. *Parties*

5. Plaintiff Oneida Indian Nation is a federally recognized Indian tribe. 68 Fed. Reg. 68,180, 68,182 (Dec. 5, 2003).

6. Defendant Oneida County is a political subdivision of the State of New York.

D. *Facts*

7. The Nation possesses lands in Oneida County, including the lands to which the County has assigned the following 59 property tax identification (or "tax parcel") numbers: 323.000-1-1.3; 323.000-1-2; 323.000-1-1.1; 299.000-1-58.1; 322.000-2-19; 322.000-2-28; 284.000-1-30; 285.000-1-32; 284.000-1-29; 285.000-1-2; 285.000-1-8.1; 284.000-1-27; 284.000-1-28; 284.000-1-37; 310.000-2-1; 270.000-1-34; 299.000-1-1; 286.000-2-83.6; 299.000-1-57.2; 299.000-1-58.3; 310.000-2-6.1; 284.000-1-23; 298.000-1-58; 298.000-1-58.2; 283.000-1-5; 298.000-1-57; 284.000-1-24; 298.000-1-3; 297.000-1-5.2; 297.000-1-5.1; 298.000-1-50.1; 298.000-1-41.2; 298.000-1-43; 299.001-1-35.2; 299.000-1-56.2; 322.014-1-23; 298.002-3-15.1; 322.015-2-65; 322.014-1-24; 252.015-2-31; 286.000-2-83.1; 312.000-1-52.1; 312.000-1-65; 324.013-1-7; 323.012-2-9; 322.000-1-30; 311.000-2-6.1; 311.000-2-10.1; 311.000-2-11; 238.000-2-5; 297.000-1-15; 322.015-2-45.1; 332.000-1-20.1; 298.002-3-17; 311.000-2-26; 361.000-1-8; 324.013-1-18; 299.000-1-31.1; 252.015-2-46. The County has notified the Nation that these lands were sold at tax sale to the County and has threatened to foreclose on and convey these lands unless the Nation pays property taxes by July 29, 2005.

8. The lands identified in paragraph 7 are located within the Oneida reservation acknowledged in the 1794 Treaty with the Six Nations [Canandaigua], Art. II, 7 Stat. 44 (Nov. 11, 1794) (the "Treaty of Canandaigua").

9. Although the Nation now has actual possession of the lands identified in paragraph 7, that has not always been the case. The Nation lost possession of those lands more than 100 years ago. The State of New York acquired the lands identified in paragraph 7 (or the Oneidas' interest in such lands) from the Oneidas in a series of transactions and transfers in 1795, 1798, 1805, 1809, 1811, 1824, 1834, 1840 and 1841.

10. None of the transactions or transfers by which the State acquired Oneida lands (or interest in lands) in 1795, 1805, 1809, 1811, 1824, 1834, 1840 and 1841 complied with the federal participation and approval requirements of the Nonintercourse Act, 25 U.S.C. § 177. All of those transactions and transfers were in violation of federal law and were void *ab initio*, and the Nation never lost its aboriginal title with respect to the lands involved in them.

11. The Congress of the United States has never modified the reservation status of the Nation lands identified in paragraph 7 that were part of the lands acquired by the State in the transactions and transfers in 1795, 1805, 1809, 1811, 1824, 1834, 1840 and 1841. These lands constitute reservation land.

12. Between 1993 and 2000, the Nation reacquired possession of the lands identified in paragraph 7 in voluntary, free market transactions.

13. The Nation lands identified in paragraph 7 are subject to restrictions against alienation by virtue of the

Nonintercourse Act, 25 U.S.C. § 177. Those restrictions have applied to the lands since the first enactment of the Nonintercourse Act in 1790, and at all subsequent times, and, in any event, apply to lands purchased by the Nation in recent years and now in the Nation's possession.

14. Under the federal decisional law applicable until March 29, 2005, the Nation's reservation lands, including the lands identified in paragraph 7 that were part of the lands acquired by the State in the transactions and transfers in 1795, 1805, 1809, 1811, 1824, 1834, 1840 and 1841, were not taxable by state and local governments while in the possession of the Oneidas. This rule of law was recognized by the United States District Court for the Northern District of New York in *Oneida Indian Nation v. City of Sherrill,* 145 F. Supp. 2d 226 (N.D.N.Y. 2001), and was affirmed by the United States Court of Appeals for the Second Circuit, 337 F.3d 139 (2d Cir. 2003).

15. While this rule of law was recognized, Oneida County nevertheless sought to impose and collect property taxes from the Nation with respect to the properties identified in paragraph 7.

16. Pursuant to its Silver Covenant Chain program, the Nation has made and continues to make payments exceeding the amount of property taxes that Oneida County seeks to enforce through foreclosure. Since 1996, the Nation has made more than $5 million in such payments to, among others, the Vernon-Verona-

Sherrill Central School District, an amount that exceeds the approximately $3 million that the County says the Nation owes in taxes, penalties and interest with respect to the lands identified in paragraph 7. The Nation would have paid more, but the County refused to accept the payments.

17. On March 29, 2005, the United States Supreme Court decided *City of Sherrill v. Oneida Indian Nation*, 125 S. Ct. 1478 (2005). The Court held that, based on equitable considerations, the federal courts would not enforce the prohibition on state and local property taxation that ordinarily would follow from the Nation's aboriginal title and the status of the Nation's lands as reservation lands. The Court did not disturb the decisions of the District Court and the Second Circuit that the Nation's aboriginal title was unextinguished or that the Nation's lands were reservation lands. The Court explicitly did not disturb its prior decision in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), the premise of which is that tribal land subject to federal restraints on alienation remains subject to those restraints if it is alienated in violation of them. The Court also did not address the lawfulness of conveyance or foreclosure of the Nation's lands.

18. After the Supreme Court issued its *City of Sherrill* decision, the Nation met with Oneida County to discuss how the Nation might make payments to the County to eliminate disputes as to property taxes. The County has not responded to the Nation's proposal to resolve the dispute, other than to press foreclosure.

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19. Oneida County issued a "Final Notice Before Redemption," dated June 1, 2005, with respect to each of the 59 properties identified in paragraph 7. (A copy of a representative Notice is attached as Exhibit A.) As to each of those properties, the County's notice recites:

> PURSUANT TO NEW YORK STATE LAW, YOU ARE HEREBY SERVED WITH NOTICE THAT THE PROPERTY DESCRIBED BELOW WAS SOLD AT TAX SALE TO THE COUNTY OF ONEIDA. THIS NOTICE IS BEING SENT TO YOU AS OWNER OF RECORD, AND ALL MORTGAGEES AND LIEN HOLDERS OF RECORD NOTIFYING EVERYONE THAT IF THIS PROPERTY IS NOT REDEEMED BY JULY 29, 2005, THEN THE PURCHASER AT TAX SALE MAY COMPLETE THE ACQUISITION AND TAKE A CONVEYANCE ACQUIRING AN ABSOLUTE ESTATE IN FEE SIMPLE OR AN ESTATE FOR YEARS IN THE LANDS AS PROVIDED BY LAW, OR AT OPTION FORECLOSE THE LIEN PURSUANT TO LAW. TO PROTECT YOUR INTEREST AND PREVENT IMMINENT SALE OF THE PROPERTY, THE CHARGES LISTED BELOW NEED TO BE PAID FORTHWITH. YOU MAY WISH TO CONTACT AN ATTORNEY TO PROTECT YOUR RIGHTS.

20. The amounts that the County says the Nation must pay in order to redeem its lands include not only

the property taxes themselves but also penalties and interest based on nonpayment of taxes during the years when the lands were immune from state and local taxation under the applicable federal decisional law. Further, in calculating the total amounts allegedly due, the County has given the Nation no credit for its more than $5 million in Silver Covenant Chain payments.

E. *First Claim: Federal Prohibitions on Foreclosure Arising from (a) Restrictions on Alienation of Land and (b) Tribal Sovereign Immunity*

21. Paragraphs 1 through 20 above are incorporated herein by reference pursuant to Fed. R. Civ. P. 10(c).

22. The lands identified in paragraph 7 are within the Oneida reservation that was confirmed and guaranteed by the 1794 Treaty of Canandaigua. The Treaty acknowledges the lands reserved to the Oneidas in the 1788 state Treaty of Ft. Schuyler to be their "reservation[]" and their "property" and guarantees that these lands "shall remain theirs, until they "choose to sell the same to the people of the United States, who have the right to purchase." The 1794 Treaty prohibits Oneida County from interfering with the Nation's possession of those lands.

23. Article I, Section 8 of the United States Constitution reposes authority over commerce with Indians in the Congress of the United States. This authority is exclusive; it preempts the authority of states

and their political subdivisions to extinguish aboriginal title to tribal reservation lands.

24. Whether or not the Nation's lands identified in paragraph 7 are taxable, they are subject to the restrictions against alienation imposed by the Nonintercourse Act, 25 U.S.C. § 177. Section 177 provides that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." Oneida County has not complied with the provisions of the Act for federal involvement in and approval of a conveyance of an interest in the Nation's lands.

25. As a federally-recognized Indian tribe, the Nation possesses tribal sovereign immunity, which bars administrative and judicial proceedings against the Nation and bars Oneida County from taking any assets of the Nation, including the lands identified in paragraph 7, whether or not the lands are restricted against alienation and whether or not they are taxable.

26. Oneida County's efforts to acquire, convey, foreclose, sell or transfer title to the Nation's lands identified in paragraph 7:

a. violate the 1794 Treaty of Canandaigua;

b. violate Article I, Section 8 of the United States Constitution and federal common

law, which give exclusive authority to Congress with respect to extinguishment of aboriginal title to Indian lands;

c. violate the Nonintercourse Act, 25 U.S.C. § 177; and

d. violate the Nation's sovereign immunity, which derives from Article I, Section 8 of the United States Constitution and from federal common law.[1]

27. Accordingly, Oneida County has no right to acquire, convey, foreclose on, sell or transfer title to the Nation's lands in the County, and the County's efforts to do so are null and void under federal law.

F. *Second Claim: Federal Limitations on Penalties, Interest and Expiration of Redemption Period*

28. Paragraphs 1 through 20 above are incorporated herein by reference pursuant to Fed. R. Civ. P. 10(c). Except to the extent that it is based on tribal sovereign immunity, this claim is made only as to the lands identified in paragraph 7 that were part of the lands acquired by the State in the transactions and transfers in 1795, 1805, 1809, 1811, 1824, 1834, 1840 and 1841.

---

1. The assertions in subparagraphs (a) and (b) of this paragraph are made only as to the lands identified in paragraph 7 that were part of the lands acquired by the State in the transactions and transfers in 1795, 1805, 1809, 1811, 1824, 1834, 1840 and 1841.

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29. Before March 29, 2005, the date the United States Supreme Court issued its *City of Sherrill* decision, the decisional law applicable to Nation reservation lands was that such lands were immune from state and local taxation while in the possession of the Nation, even if recently reacquired.

30. In *City of Sherrill*, the Supreme Court changed the decisional law, holding that, notwithstanding the Nation's aboriginal title to its lands and the reservation status of those lands, based on equitable principles, the federal courts would not enforce the immunity from state and local taxation that the lands ordinarily would be accorded.

31. The "Final Notices Before Redemption" that Oneida County has issued with respect to the Nation lands identified in paragraph 7 indicate that, in order to redeem those lands, the Nation must pay the amounts specified in the Notices by July 29, 2005. The amounts that the County says the Nation must pay include penalties and interest based on the Nation's nonpayment of property taxes prior to March 29, 2005. In other words, the County seeks to impose penalties and interest for nonpayment of property taxes during a period when, under the applicable federal decisional law, the County could not impose such taxes.

32. It would be inequitable to permit Oneida County to assess penalties and interest for nonpayment during a time when the federal courts had held that the Nation's reservation lands were immune from taxation.

Equitable principles, including the equitable principles applied by the Supreme Court in *City of Sherrill*, do not permit such an inequitable result. Accordingly, Oneida County's efforts to impose penalties and interest based on the Nation's nonpayment of property taxes prior to March 25, 2005, and to make payment of such penalties and interest a condition of the Nation's redemption of its lands in Oneida County, are null and void, as are any tax sales of Nation lands for nonpayment of amounts that include penalties and interest imposed prior to March 29, 2005.

33. Further, the penalties and interest that Oneida County seeks to impose on the Nation are fines, not property taxes. They are, therefore, barred by the tribal sovereign immunity the Nation possesses as a federally recognized Indian tribe, even if the County otherwise can tax the land.

34. Under the Oneida County Tax Act, the Nation is entitled to a one-year redemption period. Without regard to the notice issue set forth below in the third claim, it would be inequitable to begin the redemption period before March 29, 2005 because, until the Supreme Court issued its *City of Sherrill* decision, the Nation was under no obligation to redeem its lands in Oneida County as a matter of federal law. Indeed, prior to March 29, 2005, the County did not send a notice regarding redemption precisely because of these equitable principles.

35. Because the redemption period could not have begun before March 29, 2005, it can expire no earlier

than March 29, 2006. Accordingly, the County's June 1, 2005 "Final Notices Before Redemption," which indicate that Nation's lands must be redeemed by July 29, 2005, are null and void, as are any efforts by the County to acquire, convey, foreclose, sell or transfer title to those lands.

G. *Third Claim: Federal and State Due Process*

36. Paragraphs 1 through 20 above are incorporated herein by reference pursuant to Fed. R. Civ. P. 10(c).

37. Throughout Oneida County's efforts, taken under color of state law, to acquire, convey, foreclose, sell or transfer title to the Nation's lands for nonpayment of property taxes, the County has failed to provide the Nation with the notice required to afford the due process to which all taxpayers are entitled under federal law and New York state law.

38. Oneida County failed to serve the Nation with written notice with respect to the County's tax sales of the Nation's lands. Instead, on information and belief, the County relied upon notice by publication, which was not sufficient.

39. Oneida County also failed to provide the Nation with one year's notice of the Nation's right to redeem its lands, although the Oneida County Tax Act provides for a one-year redemption period. Instead, the County gave the Nation less than two months' notice of

its right to redeem, giving notice on or about June 1, 2005 that it would take a conveyance acquiring an absolute estate in fee simple in the lands and sell the lands at auction after July 29, 2005. This belated notice of a truncated redemption period unlawfully eliminated more than ten months of the required one-year redemption period.

40. Deeds that Oneida County has executed as to the lands identified in paragraph 7 say that the County has complied with the notice by publication requirements set forth in the Oneida County Tax Act. We have been unable to verify this assertion.

41. By virtue of the foregoing notice defects, Oneida County's efforts to deprive the Nation of its lands deprives the Nation of the due process rights secured by (a) the Constitution and laws of the United States and (b) the Constitution and laws of New York. They are, therefore, illegal, void and in violation of those laws and 42 U.S.C. § 1983.

H. *Fourth Claim: Reservation Status of Nation Lands*

42. Paragraphs 1 through 20 above are incorporated herein by reference pursuant to Fed. R. Civ. P. 10(c).

43. In a series of treaties with the Nation, culminating in 1794 in the Treaty of Canandaigua, the United States confirmed a substantial tract of the Nation's aboriginal homeland to be its "property" and

its "reservation[ ]," and guaranteed the Nation "free use and enjoyment" of these lands for all time.

44. The lands identified in paragraph 7 that were part of the lands acquired by the State of New York in the transactions and transfers in 1795, 1805, 1809, 1811, 1824, 1834, 1840 and 1841 were part of the Oneida reservation lands acknowledged in the 1794 Treaty of Canandaigua.

45. No federal statute or treaty authorized the transfer of the lands acquired by the State in the transactions and transfers in 1795, 1805, 1809, 1811, 1824, 1834, 1840 and 1841 or eliminated the reservation status of those lands or federal treaty protection of them.

46. Oneida County disputes the reservation status of the Nation's lands under federal law, so there exists an actual controversy as to this issue. That status is important in many respects, including to the application of Real Property Tax Law § 454 and Indian Law § 6, which exempt an Indian tribe's property from taxation if located within an Indian reservation.

47. The Nation seeks a declaration that the lands identified in paragraph 7 that were part of the lands acquired by the State in the transactions and transfers in 1795, 1805, 1809, 1811, 1824, 1834, 1840 and 1841 are Oneida reservation lands.

Appendix G

1. *Prayer for Relief*

WHEREFORE, the Nation prays for entry of judgment in its favor and against Oneida County, awarding the Nation:

a. a declaration:

(i) that Oneida County may not impose penalties and interest on the Nation for nonpayment of property taxes prior to March 29, 2005, may not sell the Nation's lands in Oneida County for nonpayment of amounts that include penalties and interest imposed prior to March 29, 2005, and may not condition redemption of the Nation's lands in Oneida County on payment of such penalties and interest, and that all of Oneida County's efforts heretofore to impose such penalties and interest, to sell the Nation's lands for nonpayment of such amounts, and to make payment of such penalties and interest a condition of redemption are null and void;

(ii) that Oneida County may not foreclose on, acquire, convey, sell or transfer title to the Nation's lands in Oneida County based on tax sales that occurred without prior written notice served on the Nation and without written notice of a right to redeem served on the Nation not less than one year

prior to the end of the noticed redemption period, and that the County's efforts heretofore to do so, including any prior tax sales and notices, violate due process and, therefore, are null and void;

(iii) that Oneida County may not acquire, convey, foreclose on, sell or transfer title to the Nation's lands within the County, and that all of Oneida County's efforts heretofore to do so and to interfere with the Nation's ownership, possession and occupancy of such lands are null and void; and

(iv) that the lands identified in paragraph 7 that were part of the lands acquired by the State of New York in the transactions and transfers in 1795, 1805, 1809, 1811, 1824, 1834, 1840 and 1841 are part of the Oneida reservation and are reservation lands;

b. an injunction:

(i) prohibiting Oneida County, its officers, agents, servants, employees and persons in active concert or participation with them from any further efforts to effectuate, maintain or complete foreclosure, acquisition, conveyance or sale of, or transfer or title to, the Nation's lands in Oneida County, and from

interfering in any way with the Nation's ownership, possession and occupancy of such lands;

(ii) mandating that they void and rescind all acts taken to acquire, convey, foreclose, sell or transfer title to the Nation's lands to date, including any prior tax sales and notices; and

(iii) prohibiting them from assessing penalties and interest for the Nation's nonpayment of property taxes prior to March 29, 2005 or conditioning redemption of the Nation's lands in Oneida County on payment of such penalties and interest; and

c. such other relief to which the Nation may be entitled at law or in equity.

Dated: July 27, 2005

Respectfully submitted,

MACKENZIE HUGHES LLP

/s/

Peter D. Carmen (501504)
101 South Salina Street, Suite 600
P.O. Box 4967
Syracuse, New York 13202
315/233-8386 FAX: 315/426-8358

Appendix G

-and-

ZUCKERMAN SPAEDER LLP
William W. Taylor, III (102710)
Michael R. Smith (601277)
David A. Reiser
1800 M Street, NW
Washington, D.C. 20036
202/778-1800 FAX: 202/822-8106

Appendix G

EXHIBIT A

NOTICE

BEFORE AUCTION

ONEIDA COUNTY [illegible] FINANCE

PHONE: (315) 798-5734 DATE: 06/01/05

TO: ONEIDA INDIAN NATION NY
PO BOX 1
VERNON NY 13476-0000

FINAL NOTICE BEFORE REDEMPTION

PURSUANT TO NEW YORK STATE LAW, YOU ARE HEREBY SERVED WITH NOTICE THAT THE PROPERTY DESCRIBED BELOW WAS SOLD AT TAX SALE TO THE COUNTY OF ONEIDA. THIS NOTICE IS BEING SENT TO YOU AS OWNER OF RECORD, AND ALL MORTGAGEES AND LIEN HOLDERS OF RECORD NOTIFYING EVERYONE THAT IF THIS PROPERTY IS NOT REDEEMED BY JULY 29, 2005, THEN THE PURCHASER AT TAX SALE MAY COMPLETE THE ACQUISITION AND TAKE A CONVEYANCE ACQUIRING AN ABSOLUTE ESTATE IN FEE SIMPLE OR AN ESTATE FOR YEARS IN THE LANDS AS PROVIDED BY LAW, OR AT OPTION FORECLOSE THE LIEN PURSUANT TO LAW. TO PROTECT YOUR INTEREST AND PREVENT IMMINENT SALE OF THE PROPERTY, THE CHARGES LISTED BELOW NEED TO BE PAID FORTHWITH. YOU MAY WISH TO CONTACT AN ATTORNEY TO PROTECT YOUR RIGHTS.

TOWN OF VERNON CITY OF SHERRILL
306005 322.015-2-45.1 OL * ASSESSMENT LAND: 15000
ACCOUNT #: 756000000 * ASSESSMENT TOTAL: 667400
SCHOOL CODE: 306000 * PROPERTY CLASS: 693

PROPERTY LOCATION: [illegible] NS
PROPERTY DESCRIPTION: MINI-MART/ GAS STATION

TN YR	TAX TYPE	CERT. NO.	TAX PLUS PENALTY	INTEREST	ADV. FEE	TOTAL DUE
99	COUNTY	003800	7347.42	734.74	0.00	$ 8082.16
00	COUNTY	003961	23197.02	2319.70	0.00	$ 25516.72
01	COUNTY	003724	24246.83	2422.68	0.00	$ 26669.51
02	COUNTY	003482	23120.07	2312.01	0.00	$ 25432.08
03	COUNTY	003253	25028.34	2502.83	0.00	$ 27531.17
04	COUNTY	002887	23771.23	1387.58	0.00	$ 25158.81
05	COUNTY	[illegible]	21603.23	1130.16	0.00	$ 22733.39

)))))))))) TOTAL AMOUNT DUE IF PAID BY 07/29/2005 = $ 162103.84

IF NECESSARY TO RECORD DEED, MINIMUM $125.00 MUST BE ADDED TO THE ABOVE TOTAL

MAKE CHECK PAYABLE TO: COMMISSIONER OF FINANCE
MAIL TO: 800 PARK AVE.
UTICA, NY 13501

FAILURE TO RECEIVE A TAX BILL DOES NOT WAIVE OBLIGATION TO PAY TAX OR PENALTY.
PLEASE RETURN THIS NOTICE WITH CHECK OR MONEY ORDER.
IF RETURN RECEIPT IS NEEDED, PLEASE INCLUDE SELF-ADDRESSED, STAMPED ENVELOPE.

) THE ORIGINAL TOWN AND COUNTY TAX FOR 2003 TOTALS --> $ 21524.89 (

APPENDIX H — DECLARATION OF HUGH C. LORDON IN *ONEIDA INDIAN NATION V. MADISON COUNTY*, NO. 5:00-CV-0506 (N.D.N.Y.), DATED JUNE 27, 2005

THE ONEIDA INDIAN NATION,

Plaintiff,

-vs-

MADISON COUNTY, NEW YORK,

Defendant.

00-CV-506 (DNH/GJD)

DECLARATION OF HUGH C. LORDON

HUGH C. LORDON, under penalty of perjury, declares:

1. I am the Chief Administrative Officer for the Oneida Indian of New York (the "Nation"). I have held this position, and my previous position as the Nation's Chief Financial Officer, since 2001. Prior to assuming my current position, I served for nine years as the Central New York district president of KeyBank, a federally-chartered bank in Syracuse, New York. Based on my current role with the Nation and my former role as a banker and businessman in this region, I also am fully familiar with the effect of the Nation's enterprises on the Central New York business community and the economy of the region.

2. Starting in 1996 and continuing through 2005, the Nation has made Silver Covenant Chain payments to several local municipalities and Madison County school districts. These awards were first given in 1996 and continued through April 2005.

3. So far, since 1996 the total amount of Silver Covenant Chain payments paid by the Nation in Madison County has been $1,657,875.82.

4. The Nation's Silver Covenant Chain payments in Madison County have increased over the years, including the years that are the subject of the foreclosure proceedings. In 1996, the Nation paid $9,519.48 in Silver Covenant Chain payments to school districts in Madison County. By 2003 the Nation made $227,293.34 in Silver Covenant Chain payments in the County, which included $211,938.14 to school districts in Madison County.

5. The Nation has continued its Silver Covenant Chain payments in Madison County in 2004 ($207,709.83) and through the first half of 2005 ($111,163.16—partial payment so far).

6. The Nation has made substantial investments in County infrastructure in addition to the Silver Covenant Chain payments. For example, in the mid-1990s the Nation invested $1 million to build a new water tower in the County, and $7 million to build a new water line to carry water along Route 365 from a municipality within the County. In addition, the Nation has committed to

expend up to $1.5 million for the first phase of an expansion of the City of Oneida sewage treatment plant in Madison County.

7. The Nation's more than $1.65 million in Silver Covenant Chain payments in Madison County, together with these other multi-million dollar investments in the County's public works, substantially exceed the unpaid taxes claimed by the County. Excluding interest and penalties (upon which the County does not set its budget), Madison County seeks $2.1 million in property taxes from the Nation. Again, none of these figures include payments made by the Nation to the City of Oneida or its school district.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 27, 2005.

/s/ Hugh C. Lordon
Hugh C. Lordon

APPENDIX I — LETTER AND MEMORANDUM DATED JUNE 10, 2005

THE ASSOCIATE DEPUTY SECRETARY OF
THE INTERIOR
WASHINGTON, D.C. 20240
June 10, 2005

Honorable Ray Halbritter
Nation Representative
Oneida Indian Nation
Box 1
Vernon, New York 13476

Dear Mr. Halbritter:

I am writing with respect to Michael R. Smith's letter dated June 7, 2005 to Michael D. Olsen. In his letter, Mr. Smith addresses issues raised by Rocco J. Diveronica in his June 1, 2005 letter to Representative John McHugh concerning the Bureau of Indian Affairs ("BIA") recordation of 331 deeds submitted by the Oneida Indian Nation ("OIN"). In addressing Mr. Diveronica's objections to the recordation of the OIN deeds, Mr. Smith purports to represent that it is the position of the BIA that lands identified in the deeds submitted by the OIN for recordation in accordance with 25 C.F.R. § 150 are "restricted against alienation pursuant to 25 U.S.C. § 177." This is to advise you that Mr. Smith misstates the position of the BIA on this issue, and further, to inform you of the Department of Interior's ("DOI") position with respect to certain issues related to status of OIN lands.

While we would agree with Mr. Smith's statement that the Supreme Court's *City of Sherrill* decision did not disturb the Court's 1985 decision in the Nation's land claim litigation that Section 177 provides the Nation a right of action to damages for trespass based on its original grant of rights in the lands at issue, we do not agree with his assertion that the Court's ruling in *Sherrill* recognizes the continuation of restriction on alienation protections over recently re-acquired lands. Indeed, the Court in *City of Sherrill* stated:

> In this action, OIN seeks declaratory and injunctive relief recognizing its present and future sovereignty immunity from local taxation on parcels of land the Tribe purchased in the local market, properties that had been subject to state and local taxation for generations. n. 7. We now reject the unification theory of OIN and the United States and hold that "standards of federal Indian law and federal equity practice" preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.

Thus, it is our opinion that Court in *City of Sherrill* unmistakably held that the lands at issue (property interests purchased by OIN on the open market) are subject to real property taxes. In the even these taxes are not paid, we believe such lands are subject to foreclosure. Further, please be advised that the BIA is in the process of taking appropriate action to clarify that its recent recordation of ION deeds does not have the legal effect of designating these lands as restricted against alienation pursuant to 25 U.S.C. 177. (See enclosure)

With regard to the related issue of OIN's pending fee-to-trust applications, the Nation should be aware that it is Departmental policy not to accept into trust lands that are encumbered by tax liens. Accordingly, we urge the Nation to resolve any outstanding tax liens that may now encumber any of the lands for which you are seeking the United States to accept in trust.

Also in regard to your fee-into-trust application, we would also urge the Nation to prioritize the parcels the Tribe desires the United States to take into trust in order of the parcel's significance to the Nation. Priortization of the parcels at issue in the pending application will greatly assist and inform the Department in deciding how to proceed in exercising the Secretary's discretion. We are especially interested in the Nation's views as to why particular parcels need to be held in trust. In addition, as a part of our evaluation process, we plan to consult with affected state and local jurisdictions to obtain their views on this subject as well.

If you have any questions or need additional information, please feel free to contact me at 202-208-6291.

Sincerely,

/s/_____
James E. Cason
Associate Deputy Secretary

Appendix 1

Enclosure: Oneida Indian Nation Deed Transmittal Clarification

cc: Honorable George Pataki, Governor State of New York
Honorable Sherwood Boehlert, Representative of New York State
Honorable John McHugh, Representative of New York State
Rocco J. Diveronica, Chairman, Madison County Board of Supervisors
Joseph A. Griffo, Oneida County Executive
David R. Townsend, Member of Assembly, State of New York

Appendix I

UNITED STATES DEPARTMENT OF
THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240

MEMORANDUM

TO: Randall Trickey, Realty Officer, Eastern Region, Bureau of Indian Affairs

FROM: Michael D. Olsen, Acting Principal Deputy Assistant Secretary - Indian Affairs

DATE: **June 10, 2005**

RE: Oneida Indian Nation of New York Deed Transmittal Clarification

On April 7, 2005, you sent to the Land Titles and Records Office (LTRO) in Anadarko, Oklahoma 331 deeds totaling 17,193 acres in Madison and Oneida Counties, New York. The transmittal document attached to the deeds indicated that the deeds were to be recorded "in favor of the Oneida Nation of New York in restricted status pursuant to 25 U.S.C. 177."

The deeds were to be recorded with the LTRO pursuant to 25 C.F.R. Part 150, which describes the authority, policy, and procedures for recording and maintaining title documents. The ministerial act of recording deeds such as those pertaining to the Oneida Nation land at issue simply provides the Bureau of

Indian Affairs with information used for recordkeeping purposes. In this case, the recordation of the Oneida Nation deeds does not have the legal effect of designating these lands as restricted against alienation pursuant to 25 U.S.C. 177. Accordingly, the use of the term "restricted status" in the transmittal document is confusing and inappropriate.

In order to alleviate the confusion generated by the April 7, 2005 transmittal document, please file with the Anadarko LTRO by noon, Monday June 13, 2005 a revised transmittal document. Please strike from the Remarks paragraph "in favor of the Oneida Nation of New York in restricted status pursuant to 25 U.S.C. 177" and replace it with "for the Oneida Nation of New York pursuant to 25 C.F.R. Part 150."

Should you have any questions, please do not hesitate to contact me at (202) 208-7163. Thank you for your immediate attention to this matter.

APPENDIX J — LETTER BY MADISON COUNTY BOARD OF SUPERVISORS DATED APRIL 11, 2005

LETTER

MADISON COUNTY BOARD OF SUPERVISORS

ROCCO J. DIVERONICA
Chairman
CINDY I. URTZ
Clerk

PO Box 635
Wampsville, NY 13163
315/ 366-2201
Fax: 315/366-2502

April 11, 2005
Secretary Gale A. Norton
United States Department of the Interior
1849 C Street, NW
Washington, DC 20240

BY FAX AND US MAIL

Dear Secretary Norton,

On March 29, 2005 the Supreme Court of the United States issued a landmark ruling in the case of the *City of Sherrill, New York v. Oneida Indian Nation of New York et al.* (03-855). That case declared illegal the Oneida Indian Nation of New York's practice of purchasing property within its ancient aboriginal homeland from current titleholders and unilaterally declaring it tax exempt, not subject to state and local regulation, and benefiting from Indian country status under federal law. Despite the unresolved and highly contested land claim

brought in the early 1970's by the New York Oneidas, and other Oneida tribal plaintiffs, and joined by the United States in 1998, the New York Oneidas sought to resolve the issues through unilateral action. Most of the dispersed, checker-boarded 17,000 acres of property now owned by the New York Oneidas was purchased since 1998. That was when the United States entered the *Oneida Indian Nation of New York v. The State of New York* case (74-CV-187) case and when the defendants thought they were engaged in good faith negotiations-facilitated by a court appointed mediator –to come to a mutually satisfactory resolution of this long-standing dispute.

It is our assessment that the New York Oneidas were not acting in good faith as they sought, through self-help purchases, to establish sovereignty over checkerboard landholdings. There can be no doubt that the Supreme Court has just repudiated such an assertion of sovereignty over a checkerboard of parcels spread over two counties affecting 15 towns, cities and villages long inhabited and governed by non-Indians.

In the *Sherrill* case, the City sought to stem this by bringing tax foreclosure proceedings on 10 properties for which the New York Oneidas refused to pay taxes. The County of Madison brought similar action against the New York Oneidas but that action was remanded back to the District Court by the 2nd Circuit Court of Appeals where it has rested pending action by the Supreme Court in the *Sherrill* case. The Supreme Court heard oral argument on January 11, 2005 and on March 29, 2005 ruled that:

Appendix J

> *Given the longstanding, distinctly non-Indian character of central New York and its inhabitants, the regulatory authority over the area constantly exercised by the State and its counties and towns for 200 years, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, standards of federal Indian Law and federal equity practice precludes the Tribe from unilaterally reviving its ancient sovereignty, in whole or in part over the parcels at issue. The Oneidas long ago relinquished governmental rules and cannot regain them through open market purchases from current titleholders.*

In its analysis the Court noted that:

> *Congress has provided in 25 U.S.C. § 465, a mechanism for acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well being. Section 465 provides the proper avenue for OIN to reestablish sovereign authority over territory last held by the Oneida 200 years ago.*

Although we do not agree, we understand that the Department of the Interior regards the scattered 17,000 acres as lands within a reservation not withstanding the fact that the Oneidas have neither resided on nor governed those lands for approximately

200 years until they bought them recently. These parcels are still the subject of pending land claim litigation. They are surrounded by non-Indian communities (cities, villages, towns and neighbors). As the Supreme Court has recognized in these circumstances, state and local governments as well as neighboring landowners would be directly and adversely affected by taking these lands into trust without adequate consideration of local interests. Any lands taken into trust should result in a reasonable number of acres in a compact, contiguous area with recognizable boundaries. A checkerboard of trust lands across Madison and Oneida Counties would result in social and governmental chaos that would serve no ones interest. This is not a routine application to take lands into trust within a reservation.

Serious efforts are in progress to try to settle the Oneida land claim litigation. Taking contested land into trust for the Oneida Indian Nation of New York while these negotiations are pending may undermine these efforts and make it very difficult for the local governments to support a settlement.

We respectfully request that the Department of the Interior not take any action on any Oneida Indian Nation of New York applications to take Madison County land into trust while the land claim lititgation is pending. Further, we ask that the public comment period be extended for six months to permit full development of factual information for the Department's full and careful consideration.

Appendix J

Relief denied the Nation by the highest court in the land should not be granted administratively, in view of the pending litigation. The court noted that:

> *A checkerboard of alternating state and tribal jurisdiction in New York State created unilaterally at the OIN's behest - would seriously burden the administration of state and local governments and would adversely affect landowners neighboring on the tribal patches.*

In closing, I want to assure you that the Madison County Board of Supervisors is steadfast in its support for a negotiated settlement of the Oneida land claim that has troubled the citizens of Madison and Oneida Counties since the first claim was filed in 1970. We believe that a negotiated settlement can create the most effective resolution of the land claim for all concerned. I hope that you can help facilitate a resolution that respects the legitimate expectations of the Oneida Indian Nation of New York as well as the citizens and governments of Madison and Oneida Countries.

Sincerely,

/s/_____
Rocco J. DiVeronica
Chairman

Cc: Governor George E. Pataki
Senator Charles E. Schumer
Senator Hillary R. Clinton
Congressman John McHugh
Congressman Sherwood Bochiert
Franklin Keel

APPENDIX K — ONEIDA INDIAN NATION'S VERIFIED ANSWER TO PETITION AND NOTICE OF FORECLOSURE IN *THE MATTER OF FORECLOSURE OF TAX LIENS*, NO. 03-999 (N.Y. SUP. CT. MADISON COUNTY), DATED MARCH 30, 2005

STATE OF NEW YORK SUPREME COURT
COUNTY OF MADISON

INDEX NO. 03-999

IN THE MATTER OF FORECLOSURE OF TAX LIENS BY ACTION

IN REM PURSUANT TO ARTICLE ELEVEN OF THE REAL PROPERTY TAX LAW

BY

THE COUNTY OF MADISON

VERIFIED ANSWER TO PETITION AND NOTICE OF FORECLOSURE

Respondent Oneida Indian Nation of New York (the "Nation"), by counsel, asserts that it owns and possesses real property that is the subject of the petition filed by Madison County in this action, that it and its property are immune from taxation and suit by virtue of the sovereign immunity of the Nation, and that this action has been improperly brought and must be dismissed because of the Nation's immunity, the absence of jurisdiction of this Court over the Nation and over the subject matter of this suit, federal law prohibiting states, their political subdivisions and their courts from

taxing or alienating Indian lands and for the other reasons set forth below.

1. The Nation is the sole possessor and owner of 98 of the tax parcels that are the subject of this foreclosure action. The County's notices identifying the parcels subject to foreclosure are set forth as Exhibit A to this Answer and are incorporated in this answer. The relevant tax parcel numbers are: 13.-1-1.14,13.23-1-5, 36.6-1-1, 36.6-1-3, 36.38-1-36, 36.38-1-34, 36.38-1-33, 36.38-1-32,7.79-1-61.2, 13.-1-37, 13.-1-1.13, 13.1-1.11, 13.22-1-7, 12.-2-25.12, 13.22-1-3, 13.22-1-6, 13.22-1-11, 35.8-1-6, 35.8-1-5, 36.5-1-20, 13.22-1-8, 18.-1-9.1, 18.-2-4, 18.-2-1, 18.-1-14, 19.-1-27, 19.-1-25, 13.23-1-6, 89.-1-5, 70.-1-17, 36.6-1-4, 28.-2-13.12, 36.-1- 2, 28.-2-13.2, 28.-2-13.11, 7.79-1-61.1, 36.62-2-21, 13.23-1-7, 74.-1-17, 91.-1-51, 74.-1-18, 74.- 1-19, 13.6-1-12, 27.20-1-6, 35.-1-28.1, 28.-1-77.2, 28.-1-77.1, 54.-2-2, 64.-1-24, 1.64.-1-13.1, 64.-1-3.2, 13.22-1-9, 63.-1-2.1, 63.-1-3, 63.-1-2.2, 64.-1-1, 74.-1-16.5, 55.-2-22, 74.-1-9, 74.-1-16.1, 83.-1-6.1, 83.-1-18, 64.-1-35, 64.-1-24.31, 54.-3-11, 61.-1-10.2, 61.-1-28, 61.-1-27, 55.-2- 21.11, 55.-2-9, 55.-2-8.1, 55.-2-7, 55.-2-5.12, 55.-2-5.11, 54.-2-6.22, 54.-2-8.12, 54.-2-6.1, 54.-2-5, 54.-2-3.62, 27.-3-23, 27.-3-22, 64.-1-3.1, 64.-1-18, 54.-3-8, 54.-3-4, 64.-1-6, 73.-1-4, 65.-1-10, 65.-1-6, 64.-1-2, 64.-1-17, 27.-3-20, 27.-3-21, 54.-2-3.13, 54.-2-3.12, 55.-2-21.12, 13.22-1-12, and 13.6-1-10.

2. These lands are and at all relevant times have been part of the Nation's aboriginal lands and its reservation. In the 1794 Treaty of Canandaigua, 7 Stat. 44, the United States confirmed and guaranteed the Nation's reservation boundaries and guaranteed to the Nation the free use and enjoyment of the lands reserved

to the Nation, including all those lands that are the subject of the Madison County foreclosure action. Other federal treaties also protect the Nation's possession of these lands.

3. At no time has the United States acted to divest the Nation of the right to possess its lands that are the subject of this action, to eliminate the reservation status of these lands, or to subject these lands to taxation by state or local governments.

4. Although the Nation's lands in Madison County have always been part of the Nation's aboriginal lands and its reservation (and therefore immune from taxation), the Nation has not always retained actual possession of these parcels.

5. The parcels in this action were alienated from the Nation in transactions that are of no validity because they violated the Indian Non-Intercourse Act, 25 U.S.C. § 177, which restricts alienation of the property today.

6. Because these transactions violated the Non-Intercourse Act, they were void *ab initio*, and the Nation at all relevant times has had the right to possess the lands that were the subject of these transactions, as held in *Oneida Indian Nation v. County of Oneida*, 470 U.S. 226 (1985).

7. The Nation has reacquired possession of lands that are part of its reservation and that had been alienated from the Nation in violation of the Non-Intercourse Act. These lands include all the parcels at

issue here, which constitute reservation lands and therefore "Indian country" under 18 U.S.C. § 1151, are subject to the restrictions on alienation and encumbrance contained in the Indian Non-Intercourse Act, and are not taxable by states or their political subdivisions. *But see City of Sherrill, New York v. Oneida Indian Nation of New York*, 544 U.S. --, No. 03-855 (S. Ct. Mar. 29, 2005).

8. The Nation is a federally recognized Indian tribe. 68 Fed. Reg. 68180 (Dec. 5, 2003). Its sovereign immunity bars Madison County's efforts to tax the Nation's land, bars this foreclosure action, and precludes the exercise of jurisdiction over the Nation and over the subject matter of this action.

9. Madison County's efforts to tax Nation land and to seek foreclosure concerning such lands, which are reservation lands never made taxable by Congress and which are Indian Country subject to the Nation's governance, are in violation of federal law. Said federal law includes:

a. Article I, Section 8 (the Indian Commerce Clause) of the United States Constitution;

b. the 1794 Treaty of Canandaigua and other federal treaties;

c. federal common law; and

d. 25 U.S.C. § 177, the Non-Intercourse Act.

10. Federal law completely preempts the laws of the State of New York, such that those state and local laws are invalid and unenforceable to the extent that they purport to permit taxation of Nation lands.

11. By virtue of the Supremacy Clause of the United States Constitution Art. VI, cl. 2, the laws of the State of New York are invalid and unenforceable to the extent that they purport to permit taxation of Nation lands.

12. Even if New York and its political subdivisions may tax the lands at issue, the Nation's sovereign immunity and federal restrictions on the alienation of the lands at issue bar this action and all of the requested relief.

13. Process and service of process were insufficient because the Nation is immune from service of process.

14. Madison County is not entitled to foreclose because it violated the notice requirements imposed by the due process protections of state and federal law. Said failure of notice consisted of Madison County's failure to serve the Nation with two years' notice of a right of redemption prior to Madison County's efforts to foreclose.

15. The Petition fails to state a claim upon which relief can be granted.

16. The Court is without jurisdiction over the subject matter and over the Respondent.

17. Wherefore, respondent Oneida Indian Nation asserts that this action must be dismissed with prejudice, and that no order of foreclosure can be entered because federal law bars taxation of the Nation's land and bars this action to enforce such taxation.

Dated: March 30, 2005

Respectfully submitted,

MACKENZIE HUGHES, LLP
By: _____
Peter D. Carmen
101 South Salina Street, Suite 600
P.O. Box 4967
Syracuse, New York 13221-4967
Telephone: (315) 233-8386
Facsimile: (315) 426-8358

-and-

ZUCKERMAN SPAEDER LLP
By: William W. Taylor*
Michael R. Smith*
1201 Connecticut Ave., NW
Washington, DC 20036
Telephone: (202) 778-1832
Facsimile: (202) 822-8106

Attorneys for Respondent Oneida Indian Nation of New York

*Not admitted in New York

APPENDIX L — ONEIDA INDIAN NATION'S VERIFIED ANSWER IN *THE MATTER OF FORECLOSURE OF TAX LIENS*, NO. 98-999 (N.Y. SUP. CT. MADISON COUNTY) DATED MARCH 31, 2000

STATE OF NEW YORK SUPREME COURT
COUNTY OF MADISON

Index No. 98-999

In the Matter of Foreclosure of Tax Liens by Action *In Rem* Pursuant to Article Eleven of the Real Property Tax Law

by

THE COUNTY OF MADISON

VERIFIED ANSWER

The Oneida Indian Nation of New York, by counsel, asserts that it owns and possesses real property that is the subject of the petition filed by Madison County in this action, that it and its property are immune from suit by virtue of the sovereign immunity of the Nation, and that this action has been improperly brought and must be dismissed because of the Nation's immunity, the absence of jurisdiction of this Court over the subject matter of this suit, the pendency of federal litigation concerning taxation of the lands in question, federal law prohibiting states, their political subdivisions, and their courts from taxing or alienating Indian lands, and for the other reasons set forth below.

Appendix L

1. The Nation is the sole possessor and owner of the thirteen tax parcels that are the subject of this foreclosure action. The town code and tax parcel numbers for these parcels are: 36.38-1-34/Town Code 253601; 36.5-1-20/Town Code 253601; 36.6-1-4/Town Code 253601; 36.38-1-32/Town Code 253601; 36.38-1-33/ Town Code 253601; 36.62-2-21/Town Code 253601; 91.-1-51/Town Code 254689; 36.6-1-1/Town Code 253601; 36.6-1-3/Town Code 253601; 36.-1-2/Town Code 253689; 28.-2-13/2/Town Code 253689; 28.-2-13.2/Town Code 253689; and 28.-2-13.11/Town Code 253689. The County's notices identifying these parcels as subjects of foreclosure are set forth as Exhibit A.

2. These lands are and at all relevant times have been part of the Nation's reservation. In the 1794 Treaty of Canandaigua, the United States confirmed and guaranteed the Nation's reservation boundaries, and guaranteed to the Nation the free use and enjoyment of the lands reserved to the Naton, including those lands that are the subject of the Madison County foreclosure action.

3. At no time has the United States acted to divest the Nation of the right to possess its lands that are the subject of this action, to eliminate the reservation status of these lands, or to subject these lands to taxation by state or local governments.

4. Although the Nation's lands in Madison County have always been part of the Nation's reservation (and therefore immune from taxation), the Nation has not

always retained actual possession of these parcels.

5. One of the parcels in this action was obtained by the State of New York from the Nation as part of a 1795 transaction. The other twelve parcels were obtained by the State from the Nation in an 1807 transaction.

6. Neither of these transactions received the approval of Congress, or otherwise involved the federal participation required by the Indian Non-Intercourse Act, 25 U.S.C. § 177, and were therefore in violation of that Act.

7. Because these transactions violated the Non-Intercourse Act, they were void *ab initio*, and the Nation at all relevant times has had the right to possess the lands that were the subject of these transactions, as held in *Oneida Indian Nation v. County of Oneida*, 470 U.S. 226 (1985).

8. The Nation has reacquired possession of lands that are part of its reservation and that had been alienated from the Nation in violation of the Non-Intercourse Act. These lands included the parcels at issue here, which constitute reservation lands and therefore "Indian country" under 18 U.S.C. § 1151, are subject to the restrictions on alienation and encumbrance contained in the Indian Non-Intercourse Act, and are not taxable by states or their political subdivisions.

9. The Nation has filed in federal court an action

challenging Madison County's right to tax the lands that are the subject of this action. The complaint is attached hereto as Exhibit B. Only federal courts have subject matter jurisdiction with respect to taxation of Indian lands. State courts, including this Court, do not have subject matter jurisdiction, because such jurisdiction is preempted by federal law. This action must be dismissed for lack of subject matter jurisdiction, or, alternatively, stayed pending adjudication of the federal litigation.

10. The Nation is a federally recognized Indian tribe. Its sovereign immunity bars Madison County's efforts to tax the Nation's land, bars this foreclosure action, and precludes the exercise of jurisdiction over the Nation. 65 Fed. Reg. 13298 (March 13, 2000).

11. Madison County's efforts to tax Nation land and to seek foreclosure concerning such lands, which are reservation lands never made taxable by Congress and are Indian Country subject to the Nation's governance, are in violation of federal law, as set forth in the attached federal court complaint (Exhibit B), which we incorporate herein by reference in its entirety. Said federal law includes:

a. Article I, Section 8 (the Indian Commerce Clause) of the United States Constitution;

b. the 1794 Treaty of Canandaigua;

c. federal common law; and

d. 25 U.S.C. § 177, the Non-Intercourse Act.

12. Federal law completely preempts the laws of the State of New York, such that those state and local laws are invalid and unenforceable to the extent that they purport to permit taxation of Nation lands.

13. By virtue of the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, the laws of the State of New York are invalid and unenforceable to the extent that they purport to permit taxation of Nation lands.

14. Process and service of process were insufficient because the Nation is immune from service of process.

15. Madison County is not entitled to foreclose because it violated the notice requirements imposed by the due process protections of state and federal law, all as specified in the federal court complaint filed by the Nation (Exhibit B). Said failure of notice consisted of Madison County's failure to serve the Nation with two years' notice of a right of redemption prior to Madison County's efforts to foreclose.

16. The Petition fails to state a claim upon which relief can be granted.

17. Wherefore, respondent Oneida Indian Nation asserts that this action must be dismissed with prejudice, and that no order of foreclosure can be entered because federal law bars taxation of the Nation's land and bars this action to enforce such taxation.

Appendix L

Dated: March 31, 2000

Respectfully submitted,

MACKENZIE SMITH LEWIS MICHELL
& HUGHES, LLP

BY: /s/
Peter D. Carmen
101 South Salina Street, Suite 600
P.O. Box 4967
Syracuse, New York 13221-4967
Telephone: (315) 233-8386
Facsimile: (315) 426-8358

-and-

ZUCKERMAN, SPAEDER, GOLDSTEIN,
TAYLOR & KOLKER, LLP
BY: William W. Taylor*
Michael R. Smith*
1201 Connecticut Ave., NW
Washington, DC 20036
Telephone: (202) 778-1832
Facsimile: (202) 822-8106

Attorneys for Respondent
Oneida Indian Nation of New York

* Not admitted in New York

Appendix L

VERIFICATION

STATE OF NEW YORK)
COUNTY OF ONONDAGA)

PETER D. CARMEN, being duly sworn, deposes and says:

1. I am the attorney for Respondent Oneida Indian Nation of New York.

2. My office is located at 101 South Salina Street, Syracuse, New York, which is within the County of Onondaga. This verification is made by me because Respondent is not within the County of Onondaga which is the County where I have my office.

3. I have read the foregoing answer and know its contents. The answer is true to my knowledge, except as to matters alleged on information and belief, and as to those matters I believe it to be true.

4. The source of my information and grounds of my belief as to all matters in the foregoing answer not stated to be made upon my knowledge are as follows: my review of Petitioner's petition and notice of foreclosure, federal law, federal treaties, and the facts.

Appendix L

/s/
Peter D. Carmen

Sworn to before me this 31st day of March, 2000.

/s/
NotaryPublic
Janet E. McGraw

APPENDIX M — ONEIDA INDIAN NATION'S COMPLAINT IN *ONEIDA INDIAN NATION V. MADISON COUNTY*, NO. 5:00-CV-0506 (N.D.N.Y.), FILED MARCH 30, 2000

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action No. 00-CV-506

ONEIDA INDIAN NATION
Route 5
Vernon, New York 13476,

Plaintiff,

-vs-

MADISON COUNTY, NEW YORK
County Office Building
North Court Street
Wampsville, New York 13163,

Defendant.

COMPLAINT

A. Nature of Action

1. The Oneida Indian Nation sues Madison County to stop the County from further efforts to enforce its *ad valorem* property tax laws with respect to Nation lands located in Madison County. The County has filed in state court an *in rem* foreclosure action against

Nation lands. These lands are Oneida reservation lands in the Nation's actual possession, are "Indian country," and are restricted against alienation. Madison County's efforts to tax and to obtain a state court foreclosure on Nation lands violate the United States Constitution and federal law.

B. Jurisdiction and Venue

2. Jurisdiction as to the Nation's federal claims exists pursuant to 28 U.S.C. §§ 1331 & 1362. Those claims arise under, and seek to preserve rights and immunities secured by, the Indian Commerce Clause (U.S. Const. Art. I, § 8) and the Due Process Clause (U.S. Const. Amend. XIV), the Non-Intercourse Act, 25 U.S.C. § 177, the 1794 Treaty of Canandaigua, and federal common law protections of tribal sovereignty and prohibitions against *ad valorem* taxation of tribal reservation land by states and their political subdivisions.

3. Jurisdiction as to the Nation's state-law claims exists pursuant to 28 U.S.C. § 1367. Those claims are so related to the federal claims that they form part of the same case or controversy.

4. The Northern District of New York is an appropriate venue pursuant to 28 U.S.C. § 1391(b). Madison County and its officials, agents and employees are in this district. All of the events giving rise to the Nation's claims occurred in this district. The real property that is the subject of this action is in this district.

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C. Parties

5. Plaintiff Oneida Indian Nation is a federally recognized Indian tribe. 65 Fed. Reg. 13298 (March 13, 2000).

6. Madison County is a political subdivision of the State of New York.

D. Facts

7. The Nation possesses properties in Madison County that consist of 15 tax parcels, 13 of which are the subject of the Madison County foreclosure action. The 13 tax parcels are as follows: 36.5-1-20; 36.6-1-1; 36.6-1-3; 36.6-1-4; 36.38-1-32; 36.38-1-33; 36.38-1-34; 36.62-2-21; 28.-2-13.2; 28.-2-13.11; 28.-2-13.12; 36.-1-2; and 91.-1-51.

8. These properties are located within and are part of the Oneida reservation recognized in the 1794 Treaty of Canandaigua. Neither the Congress of the United States, nor any other part of the Government of the United States, ever has modified the reservation status of these properties or made them subject to taxation by a state or local government.

9. Although the Nation's properties in Madison County always have been part of the Oneida reservation, the Nation has not always had actual possession of them. In 1795, the State of New York executed a treaty with the Nation to purchase certain land within the

Reservation. One of the Madison County parcels that are now the subject of the County's foreclosure efforts was part of the 1795 transaction. That parcel was in the possession of non-Indians over the years, such that, from 1795 until about the 1990s, the parcel was out of the Nation's actual possession.

10. Similarly, in 1807, the State of New York executed a treaty with the Nation to purchase additional land within the Nation's Reservation. The remaining twelve of the Madison County parcels that are now the subject of the County's foreclosure efforts were part of this transaction. These parcels were in the possession of non-Indians over the years, such that, from 1807 until about the 1990s, the parcels were out of the Nation's actual possession.

11. Neither the 1795 transaction described in paragraph 9 nor the 1807 transaction described in paragraph 10 complied with any of the federal participation and approval requirements of 25 U.S.C. § 177, and neither was approved by any branch of the Government of the United States. All such transactions and transfers were in violation of federal law and were *void ab initio*, including the transactions and transfers involving the Madison County parcels, and the Nation never lost its possessory rights with respect to those parcels.

12. In the 1990s, the Nation acquired actual possession of the properties in Madison County. By voluntary, free market transactions, those non-Indians

who then were in actual possession agreed to leave and to give to the Nation possession and any other rights they had in the properties.

13. The Nation's properties that are the subject of this action constitute reservation land and, therefore, "Indian country" within the meaning of 18 U.S.C. § 1151. Further, the Nation's properties are subject to restrictions on alienation and encumbrance by virtue of the Non-Intercourse Act, 25 U.S.C. § 177.

14. Notwithstanding the status of the Nation's Madison County properties, the County, acting under color of state law, has sought to collect *ad valorem* property taxes from the Nation with respect to those properties. The Nation has refused to pay those taxes on the ground that the County's imposition of the taxes is illegal under federal law. Madison County ignored the Nation's objections, and on December 1, 1999, filed in state court an *in rem* foreclosure proceeding against the Nation's properties.

15. Madison County seeks entry by the state court of a judgment of foreclosure as early as March 31, 2000. Madison County refuses to dismiss the state court action or to adjourn deadlines in order to avoid federal litigation.

E. First Claim: Federal Preemption

16. Paragraphs 1 through 15, above, are incorporated herein by reference pursuant to Fed. R. Civ. P. 10(c).

17. The Nation's properties in Madison County, specifically identified in paragraph 7, are in the actual possession of the Nation, and the Nation has had a possessory right to those properties from time immemorial.

18. The Nation's properties are within the Oneida reservation established by the 1794 Treaty of Canandaigua. The Treaty confirms the Nation's possessory right and guarantees the Nation the "free use and enjoyment" of its reservation. It precludes taxation of the Nation's reservation land.

19. The Nation's properties constitute reservation land and are Indian country within the meaning of 18 U.S.C. § 1151.

20. The Nation's properties in Madison County are not subject to the County's taxation. Article I, Section 8 of the United States Constitution reposes authority over Indian commerce in the Congress of the United States. This authority is exclusive; it preempts the authority of states and their political subdivisions to impose taxes on tribal land within Indian country, including reservation land possessed by an Indian tribe. Further, in the absence of Congressional authorization to impose such taxes, efforts by states and their political subdivisions to do so is a violation of an Indian tribe's sovereign immunity.

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21. Madison County's efforts to impose *ad valorem* property taxes on the Nation's properties and to coerce payment of those taxes by the Nation by foreclosing upon and encumbering those properties:

a. violate the 1794 Treaty of Canandaigua, which is the supreme law of the land by virtue of Article VI of the United States Constitution;

b. violate Article I, Section 8 of the United States Constitution and federal common law, which give exclusive authority to Congress with respect to taxation of Indian land and preempts the jurisdiction of state courts with respect to taxation of Indian land;

c. violate the Nation's sovereign immunity, which derives from Article I, Section 8 of the United States Constitution and from federal common law;

d. violate the Non-Intercourse Act, 25 U.S.C. § 177, in that Madison County has not complied with any provision of the Act for federal involvement in and approval of a conveyance of an interest in the Nation's properties or of eviction of the Nation from them, and state courts do not have the power to authorize transfers or alienation of Indian land; and

e. violate 42 U.S.C. § 1983, in that, under color of state law, they deprive the Nation of rights, privileges and immunities secured by the United States Constitution and by the laws of the United States.

22. Accordingly, Madison County has no right to tax, sue in state court, foreclose on, or transfer the Nation's properties, and Madison County's actions are null and void.

F. Second Claim: Federal and State Due Process

23. Paragraphs 1 through 15, above, are incorporated herein by reference pursuant to Fed. R. Civ. P. 10(c).

24. In the course of its efforts, under color of state law, to tax and foreclose upon Nation lands, Madison County failed to provide the Nation with the notice or redemption period required to afford due process under the laws of the United States and under the laws of the State of New York.

25. New York Law provides for a two-year period during which an allegedly delinquent tax owner may redeem his property. Due process principles require notice of the two-year redemption period no less than two years before expiration of the redemption period. Madison County failed to give that notice.

26. By virtue of the foregoing notice defect, Madison County's efforts to foreclose on the Nation's properties deprive the Nation of due process as guaranteed by the laws of the United States and the laws of New York and are illegal, void, and in violation of 42 U.S.C. § 1983.

G. Prayer for Relief

WHEREFORE, the Nation prays for entry of judgment in its favor and against Madison County, awarding the Nation:

a. a declaration that the County may not impose or seek to collect *ad valorem* property taxes from the Nation based on the lands owned and possessed by the Nation within Madison County, that the Nation and its lands are not subject to *ad valorem* property taxation by Madison County, that all of Madison County's efforts heretofore to tax such lands are null and void, that all of the County's actions to foreclose on Nation lands -- and its notices of delinquency and liens on such lands -- are null and void, that all of Madison County's efforts to interfere with the Nation's ownership and possession of such land are null and void, that Madison County may not transfer title to, or sell, the Nation's lands, and that the state court is without jurisdiction or power with respect to taxation of Nation lands;

b. an injunction prohibiting Madison County, its officers, agents, servants, employees and persons in active concert or participation with them, from

subjecting the Nation and its lands to *ad valorem* property taxation, prohibiting them from any interference with the Nation's ownership and possession of its lands and from any effort to foreclose on the Nation's lands or to litigate in state court concerning taxation of Nation lands, and mandating that they void and rescind all notices, liens, petitions, and other official documents or acts taken with respect to enforcement of the *ad valorem* property tax laws as against the Nation and its lands;

c. attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and

d. such other relief to which the Nation may be entitled at law or in equity.

Dated: March 30, 2000

Respectfully submitted,

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APPENDIX N — ONEIDA INDIAN NATION'S REPLY TO COUNTERCLAIMS IN *ONEIDA INDIAN NATION V. CITY OF SHERRILL*, NO. 00-CV-223 (N.D.N.Y.), DATED MARCH 14, 2000

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Civil Action No. 00-CV-223 (NPM/GJD)

ONEIDA INDIAN NATION,

Plaintiff,

v.

CITY OF SHERRILL,

Defendant.

REPLY TO COUNTERCLAIMS

Plaintiff Oneida Indian Nation, by counsel and pursuant to Fed. R. Civ. P. 12(a)-(b), submits this reply to the counterclaims filed by defendant City of Sherrill.

A. Preliminary Statement

1. Plaintiff denies that defendant is entitled to tax or to take plaintiff's land, to receive damages for the non-receipt of taxes or to prohibit plaintiff from the possession and development of land. Plaintiff has acquired possession of its land in Sherrill from willing sellers for fair market value and thus is in possession of

lands reserved to it by long-standing federal treaties. These lands are restricted against alienation by 25 U.S.C. § 177 and are Indian Country within the meaning of federal law. Congress never authorized the taxation of these lands, their alienation from plaintiff, any change in their reservation status or any change in plaintiff's right to possess them. Thus, federal law forbids state and local taxation of these lands, and Sherrill is obligated to comply with this federal law. Plaintiff's tax immunity notwithstanding, plaintiff makes Silver Covenant Chain payments, usually far exceeding any taxes in dispute, and also makes payments for services, but defendant will not request or accept such payments because they are not labeled as tax payments and, accordingly, defendant has deprived Sherrill citizens of the benefit of these funds.

B. Specific Responses to Numbered Paragraphs in Counterclaims

2. Paragraph 29 incorporates paragraphs 1 through 28 of defendant's answer and, therefore, does not contain allegations requiring admission or denial. To the extent that paragraph 29 alleges that defendant is entitled to tax plaintiff's land and to affect plaintiff's ownership of or right to possess those lands, that allegation is denied. To the extent that paragraph 29 contains any other allegations, those allegations are denied.

3. Plaintiff admits that it entered into transactions to reacquire actual possession of its properties but otherwise denies the allegations in paragraph 30.

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4. Plaintiff admits the allegations in paragraph 31 that the Nation has refused to pay property taxes and that defendant's Charter sets forth a property tax and enforcement scheme. Plaintiff denies that the Charter addresses or applies to taxation of Indian lands and denies that it requires plaintiff to pay property taxes. Plaintiff denies all other allegations in paragraph 31.

5. Plaintiff is without sufficient information to admit or deny the allegations in paragraph 32; further, the alleged publication, if it exists, speaks for itself. Plaintiff denies that defendant was authorized to take the acts alleged with respect to plaintiff.

6. Plaintiff admits the allegation in paragraph 33 that it has not paid property taxes. Plaintiff denies the allegation that it owed or owes property taxes and that it is delinquent with respect to such taxes. Plaintiff is without sufficient information to admit or deny the allegations in paragraph 33 concerning the contents of the alleged notice, which speaks for itself, or concerning the recipients of that notice.

7. Plaintiff admits the allegation in paragraph 34 that defendant mailed a notice, which speaks for itself, but denies that the notice complied with applicable law. Plaintiff denies the allegation of delinquency and denies that defendant was authorized to take any of the acts alleged.

8. Plaintiff denies any allegation in paragraph 35 that defendant was authorized to take the actions

alleged. As for the contents of the Charter, it speaks for itself. Plaintiff admits the allegation in paragraph 35 that plaintiff did not pay property taxes but denies that any were owed and denies that there was a delinquency. Plaintiff is without sufficient information to admit or deny the allegation concerning the actions of the City Clerk.

9. With respect to the allegations in paragraph 36, plaintiff denies that defendant was authorized to take the acts alleged. Regarding the content of the Charter, it speaks for itself. Plaintiff denies that defendant complied with applicable law concerning notice and is without sufficient information to admit or deny the allegations concerning defendant's efforts at publication.

10. Plaintiff admits the allegation in paragraph 37 that is has not paid property taxes but denies that it owned or owes property taxes and denies that defendant had authority to take the acts alleged. Plaintiff denies any allegation in paragraph 37 that the City of Sherrill provided plaintiff with the requisite notice of a two-year redemption period. Plaintiff denies the allegation in paragraph 37 that defendant complied with its Charter, which speaks for itself.

11. Plaintiff is without sufficient information to admit or deny the allegation in paragraph 38 concerning publication. As for the allegation about the contents of the Charter, it speaks for itself. Plaintiff denies that defendant provided the requisite notice of the

redemption period and denies that defendant had authority to take any of the acts alleged.

12. Plaintiff admits that defendant provided notice to the persons and at the places alleged in paragraph 39 but denies that the content or service of the notice complied with defendant's Charter or with state and federal law. Plaintiff denies that the properties were unoccupied and denies that defendant personally served the owner or occupant of the properties. As to allegations about the contents of the Charter, it speaks for itself. Plaintiff admits that William Hervey was Director or Intergovernmental Relations and that Kathy Perham was Executive Assistant to the General Manager of Oneida Textile Designs but denies that either was the owner or occupant of the property. Plaintiff denies that defendant had authority to take any of the acts alleged.

13. Plaintiff denies any allegation in paragraph 40 that property taxes were owed. Plaintiff admits that defendant's counsel sent a letter concerning payment of taxes under protest. To the extent that defendant alleges in paragraph 40 that plaintiff did not respond with a proposal to maintain the status quo pending federal litigation of defendant's taxation authority, that allegation is denied. The allegation that plaintiff did not pay taxes, under protest or otherwise, is admitted.

14. Plaintiff admits the allegation in paragraph 41 that the Oneida County Clerk recorded defendant as the owner of the properties in furtherance of

defendant's illegal tax enforcement efforts. Plaintiff denies that any acts of defendant or of the Oneida County Clerk were valid or lawful or that they had authority to take any of these acts. Plaintiff denies that it is in wrongful possession of the properties and that defendant is entitled to ownership or possession of them. Plaintiff admits that defendant commenced the referenced eviction proceeding but denies that it did so on February 15, 2000. Plaintiff admits that it operates a retail outlet and a textile design facility on the properties in questions, taken as a whole.

15. Plaintiff admits that it has not paid property taxes and denies any allegation in paragraph 42 that any such taxes have been or are due. Plaintiff admits that it, like all other property owners in Sherrill who are not obliged to pay property taxes, receives municipal services such as garbage removal that are provided to everyone. Plaintiff denies that such services include zoning enforcement and planning.

16. Plaintiff denies the allegation in paragraph 43 that it has owed or owes property taxes and admits the allegation that it has not paid property taxes. Plaintiff denies that its possession of property in Sherrill will diminish property taxes available to Sherrill or funds available to Sherrill. Plaintiff denies that the allegation in paragraph 43 that "law abiding, tax-paying citizens will suffer" because of plaintiff's property purchases. The truth is that the Nation's possession of property has bolstered the economic base and revenues of local governments like defendant and that Sherrill residents

"suffer" only because defendant has declined to request or accept Silver Covenant Chain payments and payments for services, payments that exceed the property taxes in dispute and are rejected on the ground that they are not labeled as a tax payment.

17. Because paragraph 44 simply incorporates defendant's allegations in paragraphs 29 through 43, plaintiff, pursuant to Fed. R. Civ. P. 10(c), hereby incorporates its responses to paragraphs 29 through 43.

18. Plaintiff admits the allegation in paragraph 45 that the properties in question are within the boundaries of the City of Sherrill, the State of New York and the United States of America. To the extent that this allegation is meant to include an allegation that the properties are taxable and are not restricted reservation land and part of Indian Country, the allegation is denied. Plaintiff denies that it must abide by defendant's taxation laws and denies any implication that defendant may violate the law of the United States prohibiting taxation of the Nation's lands in Sherrill. Plaintiff denies that defendant has provided the tax and foreclosure notices required by state and federal law. As for allegations of the contents of the Sherrill Charter, it speaks for itself. Plaintiff denies that the Charter compels taxation of Nation lands. The Charter must be interpreted to recognize federal law prohibitions on state and local taxation of Indian lands.

19. Plaintiff denies the allegations in paragraph 46, except that as to the contents of the Sherrill Charter, the Charter speaks for itself.

20. Plaintiff denies that defendant is entitled to tax lands now possessed by plaintiff and denies that defendant is entitled to the declaration for which it prays in paragraph 47. Plaintiff is without sufficient information to admit or deny any allegation concerning lands that could possibly be possessed in the future.

21. Plaintiff denies that defendant is entitled to the relief requested in paragraph 48.

22. Because paragraph 49 simply incorporates defendant's allegations in paragraphs 29 through 43, plaintiff, pursuant to Fed. R. Civ. P. 10(c), hereby incorporates its responses to paragraphs 29 through 43.

23. Plaintiff denies the allegations in paragraph 50.

24. Plaintiff admits that it has not paid property taxes and denies all other allegations in paragraph 51.

40. Defendant's counterclaims fail to state any claim upon which relief can be granted.

D. Second Defense

41. The Nation is a federally recognized Indian tribe, and its sovereign immunity bars defendant's efforts to tax and to take the Nation's land, bars this suit, and precludes the exercise of jurisdiction over the Nation and the award of any relief requested by defendant. 63 Fed. Reg. 71941 (Dec. 30, 1998).

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E. Third Defense

42. Defendant's efforts to tax Nation land, to take Nation land and to evict the Nation from its lands, which are reservation lands and Indian Country subject to the Nation's governance, are in violation of federal constitutional, statutory and common law, including but not limited to the Indian Commerce Clause (Art. I, sec. 8) of the United States Constitution, the 1794 Treaty of Canandaigua, 25 U.S.C. § 177 and federal common law, as alleged in plaintiff's complaint filed in this action, which complaint is incorporated herein pursuant to Fed. R. Civ. P. 10(c).

F. Fourth Defense

43. Federal law completely preempts the laws of the defendant and of the State of New York, such that those state and local laws are invalid and unenforceable to the extent that they purport to permit taxation of Nation lands. Further, complete preemption bars state and local efforts to restrict an Indian Nation's possession of land or to impose a fee on an Indian Nation because it possesses land.

G. Fifth Defense

44. By virtue of the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, the laws of the defendant and of the State of New York are invalid and unenforceable to the extent that they purport to permit taxation of plaintiff's land, the imposition of a fee on plaintiff or regulation of plaintiff's right to possess its lands.

H. Sixth Defense

45. Sherrill may not evict the Nation or take title to or possession of the Nation's lands because defendant violated the notice and due process requirements of state and federal law, as alleged in the complaint in this action and as incorporated here by reference pursuant to Fed. R. Civ. P. 10(c).

I. Seventh Defense

46. The federal constitutional principle of separation of powers bars a judicial order of eviction where Congress has not authorized the conveyance of plaintiff's lands pursuant to the requirements of 25 U.S.C. § 177. The same principle bars an order that plaintiff not "purchase" or possess lands reserved to it by the 1794 Treaty of Canandaigua, as Congress has not authorized the conveyance of those lands, or dispossessed plaintiff of them, pursuant to 25 U.S.C. § 177. The same principle bars an order imposing a fee on plaintiff as a consequence of its possession of land, or restrictions on improvement of such land, because such matters are committed to Congress.

J. Eighth Defense

47. The Equal Protection Clause of the United States Constitution bars any order that the Nation must pay for services and may not purchase or possess additional property or improve existing property.

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K. Ninth Defense

48. The Due Process Clause of the United States Constitution prohibits any order that the Nation not purchase, possess, or improve land.

L. Tenth Defense

49. The Takings Clause of the United States Constitution prohibits any order that the Nation not purchase, possess or improve land.

M. Eleventh Defense

50. The Privileges and Immunities Clauses of the United States Constitution prohibits any order that the Nation not purchase, possess or improve land.

N. Twelfth Defense

51. The United States Constitution, including but not limited to the Indian Commerce Clause, the Fifth Amendment and the Fourteenth Amendment, prohibit the relief requested by Sherrill.

O. Thirteenth Defense

52. Congress has not authorized the taxation or alienation of the lands in dispute in this action, has not authorized any change in their reservation status or their restricted status, and has not authorized any limitation on the Nation's possession or use of such lands.

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P. Fourteenth Defense

53. Plaintiff is entitled to a set-off for funds paid to Oneida County pursuant to its Silver Covenant Chain program.

Q. Fifteenth Defense

54. There is no case or controversy, justiciable controversy or actual dispute concerning lands plaintiff does not now possess in Sherrill but may come to possess there in the future. It is speculative whether and how plaintiff will come to possess such lands and whether there will be a tax controversy concerning them. These speculative matters are not a proper basis for declaratory judgment or for an injunction.

R. Sixteenth Defense

55. Defendant has refused to request or accept Silver Covenant Chain payments and has refused to request or accept payments for services, both payments having been offered by plaintiff. These regular payments substantially exceed all property taxes plaintiff contends it is owed annually on all lands in Sherrill possessed by plaintiff. Defendant, accordingly, is estopped from seeking, and has waived any right to seek, damages and injunctive relief.

WHEREFORE, plaintiff prays for entry of judgment in its favor and against defendant, providing that defendant take nothing and providing plaintiff appropriate declaratory and injunctive relief with

respect to defendant's illegal and invalid efforts to tax and to take Nation lands and providing plaintiff with such other relief to which it may be entitled at law or in equity, including but not limited to attorneys' fees and costs and such orders as are appropriate to assure the Nation's ownership and possession of its lands and to halt Sherrill's efforts to tax and to take those lands.

Dated: March 14, 2000

Respectfully submitted,

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APPENDIX O — ONEIDA INDIAN NATION'S ANSWER IN *CITY OF SHERRILL V. ONEIDA INDIAN NATION*, NO. 00-CV-327 (N.D.N.Y.), DATED MARCH 6, 2000

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

No. 00-CV-327 (NPM-GLS)

THE CITY OF SHERRILL, NEW YORK,

Petitioner,

vs.

ONEIDA INDIAN NATION OF NEW YORK,

Respondent.

ANSWER

Respondent Oneida Indian Nation, by counsel, pursuant to Fed. R. Civ. P. 12(a)-(b) and 81(c), serves this answer to the Petition filed in this action by Petitioner City of Sherrill, New York.

A. Preliminary Statement

In its Petition, the City of Sherrill rests its eviction request upon the provisions of the City of Sherrill Charter concerning enforcement of property taxation. Federal law prohibits states and their political subdivisions from taxing an Indian Nation's land and

from taking any act to affect an Indian Nation's ownership of and right to possess its lands, absent congressional authorization. The City of Sherrill is obligated to obey federal law; it has no authority to modify or eliminate federal law. Consequently, all of the tax enforcement efforts alleged by the City of Sherrill in its Petition have been illegal, and the City is not entitled to the Warrant of Eviction for which it has prayed.

B: Specific Responses to Allegations in Petition

Respondent responds to the allegations in each numbered paragraph of the Petition as follows:

1. The allegations in paragraph 1 are admitted.

2. The allegation in paragraph 2 that there are properties on West Seneca Street and on Prospect Street with the given tax map identifications is admitted. Respondent further admits that the City of Sherrill has attempted to enforce its tax laws as against these properties and has purported to take title to these properties. Respondent denies all other allegations in paragraph 2, including but not limited to any allegation that the City of Sherrill is authorized to enforce its tax laws as against these properties and any allegation that the City of Sherrill has valid title to these properties.

3. Respondent admits the allegation in paragraph 3 that the Nation owned the specified properties but denies all other allegations in paragraph 3, including but not limited to the allegation that the Nation is a

corporate entity and the allegation that it lost title to, ownership of or the right to possess the specified properties, all of which are protected by federal law against Sherrill's efforts to tax and take the Nation's lands.

4. Respondent admits the allegation in paragraph 4 that Mr. Holmes purported to take the actions specified but denies all other allegations in paragraph 4, including but not limited to the allegation that title could be or was conveyed validly.

5. Respondent admits the allegation in paragraph 5 concerning the contents of the specified section of the Sherrill City Charter but denies that any part of the Charter validly authorizes Sherrill to tax Nation lands or to take or convey title to Nation lands.

6. The allegations in paragraph 6 are denied, including but not limited to the allegation that the Nation does not have the right to possess the properties in question.

7. All allegations in the Petition not specifically admitted herein are denied.

8. Respondent denies that Petitioner has any right to process the Nation's properties and denies that Petitioner is entitled to any of the relief for which it has prayed, including but not limited to issuance of a Warrant of Eviction, costs or disbursements.

C. First Defense

9. The Petition fails to state a claim upon which relief can be granted.

D. Second Defense

10. The Nation is a federally recognized Indian tribe, and its Sovereign immunity bars Sherrill's efforts to tax and take the Nation's land, bar this suit, and precludes the exercise of jurisdiction over the Nation. 63 Fed. Reg. 71941 (Dec. 30, 1998).

E. Third Defense

11. Sherrill's efforts to tax Nation land, to take Nation land, and to evict the Nation from its lands, which are reservation lands and Indian Country subject to the Nation's governance, are in violation of federal law, as set forth in the complaint filed February 4, 2000 by the Nation in *Oneida Indian Nation v. City of Sherrill*, No. 00-CV-223 (NPM-GJD) (N.D.N.Y.), which we incorporate herein by reference in its entirety pursuant to Fed. R. Civ. P. 10(c), and attach as Exhibit 1. Said federal law, which protects the Nation's ownership of and right to possess its lands as against contrary state and local laws and acts, includes, but is not limited to:

a. Article I, Section 8 (the Indian Commerce Clause) of the United States Constitution;

b. the 1794 Treaty of Canandaigua;

c. federal common law; and

d. 25 U.S.C. § 177, the Non-Intercourse Act.

E. Fourth Defense

12. Federal law completely preempts the laws of the City of Sherrill and of the State of New York, such that those state and local laws are invalid and unenforceable to the extent that they purport to permit taxation of Nation lands.

G. Fifth Defense

13. By virtue of the Supremacy Clause of the United States Constitution. Art. VI. cl. 2, the laws of the City of Sherrill and of the State of New York are invalid and unenforceable to the extent that they purport to permit taxation of Nation lands.

H. Sixth Defense

14. Process and service of process were insufficient.

I. Seventh Defense

15. Sherrill is not entitled to evict the Nation because Sherrill violated the notice requirements imposed by the due process protections of state and federal law, all as specified in the complaint filed by the Nation on February 4, 2000 in *Oneida Indian Nation v. City of Sherrill*, No. 00-CV-223 (NPM-GJD) (N.D.N.Y.)

(Exhibit 1). Said failures of notice include but are not limited to:

a. failure to identify in initial notices of tax delinquency the specific properties on which taxes were allegedly delinquent;

b. failure to serve the nation with written notice of the November 5, 1997, November 5, 1998 and November 10, 1999 tax sales ;and

c. failure to serve the Nation with two years' notice of a right of redemption prior to Sherrill's efforts to convey title.

J. Eighth Defense

16. The claim Petitioner seeks to state in the Petition is a compulsory counterclaim under Fed. R. Civ. P. 13(a) in the aCtion first-filed by the Nation, *Oneida Indian Nation v. City of Sherrill*, No. 00-CV-223 (NPM-GJD) (N.D.N.Y.) (Exhibit 1), and Petitioner has, in fact, filed that claim as a compulsory counterclaim in the referenced action, such that the Petition in this action is merely duplicative of the counterclaim filed in this same court in the referenced action.

K. Prayer for Relief

WHEREFORE Respondent Oneida Indian Nation prays for entry of judgment in its favor and against

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Petitioner City of Sherrill, New York, dismissing this action with prejudice, awarding Petitioner nothing, and awarding the Nation such relief as the Nation may be entitled to [missing text]

Dated: March 6, 2000

MACKENZIE SMITH LEWIS MICHELL
& HUGHES, LLP

BY: /s/
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Attorneys for Respondent Oneida Indian Nation of New York

APPENDIX P — CITY OF SHERRILL'S ANSWER AND COUNTERCLAIMS IN *ONEIDA INDIAN NATION V. CITY OF SHERRILL*, NO. 00-CV-223 (N.D.N.Y.), DATED FEBRUARY 24, 2000

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action No. 00-CV-223

THE ONEIDA INDIAN NATION,
Route 5
Vernon, New York 13476,

Plaintiff,

vs.

CITY OF SHERRILL,
377 Sherrill Road
Sherrill, New York 13461,

Defendant.

ANSWER AND COUNTERCLAIMS

Defendant the City of Sherrill, by its attorneys, Fried, Frank, Harris, Shriver, & Jacobson, as and for its answer and counterclaim, states and alleges upon knowledge as to itself and upon information and belief as to all other matters, as follows:

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1. Denies each and every allegation of paragraph 1 of the complaint, except admits the City of Sherrill notified the Oneida Indian Nation that, unless it paid its property taxes on tax parcels 322.014-1-23, 322.014-1-25, and 322.014-1-26 by February 8, 2000, Sherrill would take title to these lands and evict plaintiff from possession of said lands.

2. Denies each and every allegation of paragraph 2 of the complaint, except admits that plaintiff purports to predicate its claims and assertions as to jurisdiction upon the statutes and legal principles referred to therein.

3. Denies each and every allegation of paragraph 3 of the complaint, except admits that plaintiff purports to predicate its claims and assertions as to jurisdiction upon the statutes and legal principles referred to therein.

4. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 4 of the complaint, except admits that the City of Sherrill is located within the Northern District of New York and admits that the real property that is the subject of this action is located within the Northern District of New York.

5. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 5 of the complaint, except admits that the Oneida Indian Nation is a federally recognized Indian tribe.

6. Admits the allegations of paragraph 6 of the complaint.

7. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 7 of the complaint, except admits that these properties have been divided by the Oneida County Department of Taxation into the following ten tax parcels: 322.014-1-23; 322.014-1-24; 322.014-1-25; 322.014-1-26; 322.015-2-1; 322.015-2-40.3; 322.015-2-45.1; 322.015-2-47; 322.015-2-64; 322.015-2-65; except denies that the properties referred to as tax parcels 322.014-1-23, 322.014-1-25, and 322.014-1-26 are currently owned by the Oneida Indian Nation.

8. Denies each and every allegation of paragraph 8 of the complaint.

9. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 9 of the complaint, except denies that plaintiff currently owns the Sherrill properties referred to as tax parcels 322.014-1-23, 322.014-1-25, and 322.014-1-26, and denies that any of the ten tax parcels enumerated in full in paragraph 7 always have been a part of the Oneida reservation, except admits that the Oneida Indian Nation has not always had possession of these properties.

10. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 10 of the complaint except

denies that since 1805 the sale of all Sherrill properties described in paragraph 9 of the complaint were in violation of federal law and were void *ab initio*, and denies that plaintiff never lost its possessory rights with respect to said properties.

11. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 11 of the complaint, except denies that plaintiff re-acquired actual possession of its own properties.

12. Denies each and every allegation of paragraph 12 of the complaint, except denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Exhibit A and respectfully refers any legal issues purportedly raised by Exhibit A to the Court.

13. Denies each and every allegation of paragraph 13 of the complaint, except admits that Sherrill has sought to collect property taxes from the Oneida Indian Nation with respect to its current and former properties and that the Oneida Indian Nation has refused to pay those taxes.

14. Denies each and every allegation contained in paragraph 14 of the complaint, except admits that defendant sent plaintiff notices in the form and language of that specified in paragraph 14, and admits that Sherrill is seeking to evict the Oneida Indian Nation from the properties referred to as tax parcels 322.014-1-23, 322.014-1-25, and 322.014-1-26, which properties were formerly owned by it.

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ANSWERING THE FIRST CLAIM OF THE COMPLAINT

15. Answering paragraph 15 of the complaint, repeats and realleges each of its responses to paragraphs 1 through 14 of the complaint as if fully set forth herein.

16. Denies each and every allegation of paragraph 16 of the complaint, except admits plaintiff is in wrongful possession of the properties referred to therein.

17. Denies each and every allegation of paragraph 17 of the complaint, and respectfully refers the document referenced therein and any issues of law raised by it to the Court.

18. States that paragraph 18 of the complaint contains only legal conclusions as to which no responsive pleading is required, and otherwise denies each and every allegation in paragraph 18 of the complaint.

19. States that paragraph 19 of the complaint contains only legal conclusions as to which no responsive pleading is required, and otherwise denies each and every allegation in paragraph 19 of the complaint.

20. States that paragraph 20 of the complaint contains only legal conclusions as to which no responsive pleading is required, and otherwise denies each and every allegation in paragraph 20 of the complaint.

21. States that paragraph 21 of the complaint contains only legal conclusions as to which no responsive pleading is required, and otherwise denies each and every allegation of paragraph 21 of the complaint.

22. Denies each and every allegation of paragraph 22 of the complaint.

ANSWERING THE SECOND CLAIM OF THE COMPLAINT

23. Answering paragraph 23 of the complaint, repeats and realleges each of its responses to paragraphs 1 through 22 of the complaint as if fully set forth herein.

24. Denies each and every allegation of paragraph 24 of the complaint.

25. Denies each and every allegation of paragraph 25 of the complaint.

26. Denies each and every allegation of paragraph 26 of the complaint.

27. Denies each and every allegation of paragraph 27 of the complaint.

28. Denies each and every allegation of paragraph 28 of the complaint.

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COUNTERCLAIMS AGAINST PLAINTIFF

29. Counterclaim Plaintiff the City of Sherrill ("Sherrill") repeats and realleges each of its responses to paragraphs 1 through 28 of the complaint as if fully set forth herein.

30. On or about February 7, 1997, Counterclaim Defendant the Oneida Indian Nation purchased the following three tax parcels in Sherrill: 322.014-1-23, 322.014-1-25, and 322.014-1-26 (collectively. the "Foreclosed Property"). Later, Counterclaim Defendant purchased seven additional tax parcels in Sherrill: tax parcels 322.015-2-64 and 322.015-2-65 were purchased on June 3, 1997; tax parcel 322.014-1-24 was purchased on June 10, 1997; tax parcel 322.015-2-1 was purchased on October 1, 1997; and tax parcels 322.015-2-40.3, 322.015-2-45.1, and 322.015-2-47 were purchased on August 31, 1998 (collectively, the "Additional Property"). The Foreclosed Property and the Additional Property were neither reservation land nor Indian country.

31. Sherrill's City Charter specifically requires that all property owners in Sherrill pay property taxes and that the city clerk shall collect such taxes. Once Counterclaim Defendant purchased the Foreclosed Property and the Additional Property, it was legally obligated, just like all other Sherrill property owners, to pay property taxes. From the time Counterclaim Defendant owned the Foreclosed Property and the Additional Property, however, it has steadfastly refused to pay property taxes, in violation of Sherrill law.

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32. Pursuant to Section 94 of Sherrill's Charter, the city clerk caused to be published a notice in The Oneida Daily Dispatch newspaper on February 28, 1997, to all Sherrill residents regarding their tax bills. The notice stated that the taxes could be paid to the city clerk at his office within thirty days from the publication of the first notice with no fee, and that the said taxes could also be paid during the next sixty days after the expiration of the first thirty days with a payment of a fee of two cents upon the dollar of tax and that after the expiration of ninety days from the first publication of such notice such tax would become delinquent and would bear interest.

33. Additionally, on February 28, 1997, Sherrill sent tax bills to its residents. Enclosed with the tax bill was a notice setting forth the same payment schedule as that published in The Oneida Daily Dispatch. Counterclaim Defendant did not pay any of its taxes on the Foreclosed Property or the Additional Property within ninety days of the publication or of receiving its bill. The taxes on those properties then became delinquent.

34. Pursuant to Section 94-a of Sherrill's Charter, after the expiration of ninety days from the first publication of the notice described above, the city clerk served Counterclaim Defendant by mail on or about August 7, 1997, a written notice requiring it to pay the delinquent taxes. Although the Sherrill Charter requires payment within ten days of the service of such notice, Sherrill afforded the counterclaim defendant until September 2, 1997, or 26 days, to tender payment.

This is the only demand of payment of the delinquent tax required under the law.

35. Pursuant to Section 94-b of the Sherrill Charter, whenever tax, penalty or interest, or any part of either of them, shall remain unpaid on the first day of August, the city clerk may proceed to advertise and sell the lands upon which the same was imposed for the payment of such tax, penalty or interest, or the part that remains unpaid. By September 16, 1997, one month longer than the statute required, there still was no payment by Counterclaim Defendant of its taxes, penalty or interest, and the city clerk proceeded to advertise the sale of the Foreclosed Property.

36. Section 94-c of the Charter requires that, when the city clerk proceeds to advertise the sale of lands for unpaid taxes, he must cause to be published a notice of the sale containing a description of the lands to be sold and specifying the time and place of the sale in the official newspaper of Sherrill, once a week for at least six consecutive weeks, immediately prior to the day of the sale. The Sherrill Charter also requires the city clerk to post such notice of the sale in at least three public places in the city at least forty-two days before the day of the sale. Accordingly, Sherrill's city clerk published notice of the sale once a week for seven consecutive weeks, on or about September 17 and 24, 1997, and October 1, 8, 15, 22, and 29, 1997, and advertised and published notice of the sale of the Foreclosed Property in The Oneida Daily Dispatch, and posted such notice at Sherrill City Hall, the Sherrill Police Station, and the Sherrill Post

Office on September 17, 1997, in accordance with Section 94-b of the Charter.

37. Counterclaim Defendant never paid taxes on the Foreclosed Property. In compliance with Section 94-d of Sherrill's Charter, the Foreclosed Property was sold to Sherrill at a public auction held on November 5, 1997. Pursuant to Section 94-f of the Charter, Counterclaim Defendant had two years from the date of sale to redeem the Foreclosed Property by paying all taxes, penalty and interest owed on the Foreclosed Property. It never did.

38. In addition, Section 94-g of the Charter requires that, before the redemption period runs out, even if it is longer than the two year statutory minimum, the city clerk must also commence the publication of the notice of the redemption from the sale, which shows the year when the sale took place, and the last day for the redemption of the property, without other or further description, and such notice shall be published at least twice in three months in the official newspaper of the city. Accordingly, the city clerk published such notice in The Oneida Daily Dispatch on November 8, 1999, December 8, 1999, and January 7, 2000.

39. Section 94-g also requires that a copy of the notice be served personally on the owner or the occupant of the property, or, if unoccupied, posted on the premises at least twenty days before the expiration of the redemption period. Accordingly, for tax parcel 322.014-1-23 such service was made on both William Hervey, whose title is the Director of Intergovernmental

Relations for the Oneida Indian Nation, and Kathy Perham, the Executive Assistant to the General Manager of the Oneida Textile Designs, on January 10, 2000. For tax parcels 322.014-1-25 and 322.014-1-26, a copy of the notice was posted on each of the unoccupied parcels.

40. Prior to the expiration of the redemption period on February 8, 2000, Sherrill made one final attempt to resolve the tax dispute with Counterclaim Defendant. Sherrill wrote a letter to Counterclaim Defendant on February 8, 2000, suggesting that it could pay its taxes under protest. Such a payment would have clearly enabled it to retain possession of the Foreclosed Property and preserve its legal options to contest such payment. Counterclaim Defendant rejected this suggestion, and did not pay the taxes owed prior to the expiration of the redemption period.

41. On February 9, 2000, pursuant to section 94-h of the Charter, Sherrill received a conveyance of the Foreclosed Property, and is recorded as the owner of the Foreclosed Property on the deed located at the Oneida County Clerk's Office. Counterclaim Defendant remains in wrongful possession of the property, on which it runs a retail outlet as well as a factory that prints silkscreens on clothing. On February 15, 2000, Sherrill commenced eviction proceedings in the City Court of Sherrill.

42. Although Counterclaim Defendant has not paid its property taxes, it has received and continues to

receive valuable municipal benefits provided to all property owners in Sherrill. These benefits include police and fire protection, garbage removal, road maintenance, and zoning enforcement and planning.

43. Counterclaim Defendant has never paid any part of the property taxes it owes on the Foreclosed Property or the Additional Property. If the counterclaim defendant purchases additional real property in the City of Sherrill, it will likewise refuse to pay property taxes on any newly-acquired property and, consequently, the amount of money the City of Sherrill receives in property taxes will be significantly diminished. As a result, the City of Sherrill's law abiding, tax-paying citizens will suffer as the quality and availability of municipal services decrease.

FIRST COUNTERCLAIM
(DECLARATORY JUDGMENT)

44. Counterclaim Plaintiff Sherrill repeats and realleges paragraphs 29 through 43 with the same force and effect as if fully set forth herein.

45. The Foreclosed Property and the Additional Property are within the City of Sherrill, located in the State of New York and are a part of the United States of America. As such, any property owner of the Foreclosed Property and the Additional Property must abide by all applicable local, state, and federal laws, including the payment of local property taxes. The local property tax law is codified in Sections 90 - 98 of the

Sherrill City Charter, which sections set forth the procedures by which residents owning real property in Sherrill shall be assessed and shall pay property taxes.

46. Counterclaim Defendant is in violation of Sherrill's local property tax law, as codified in Sherrill's Charter, due to its failure to pay local property taxes.

47. Counterclaim Plaintiff Sherrill therefore requests a declaration that Sherrill may lawfully impose and seek to collect property taxes from Counterclaim Defendant on the properties it once owned (the Foreclosed Property), it now owns (the Additional Properties), or it may own in the future, and that appear on the tax rolls of Sherrill.

48. Counterclaim Plaintiff Sherrill further requests a declaration that Sherrill's Charter applies to all such properties described in paragraph 47, above.

SECOND COUNTERCLAIM
(EVICTION)

49. Counterclaim Plaintiff Sherrill repeats and realleges paragraphs 29 through 43 with the same force and effect as if fully set forth herein.

50. Pursuant to the Section 94 of the Sherrill Charter, the Foreclosed Property is currently owned by Sherrill and Sherrill has a possessory right to the Foreclosed Property.

51. Because Counterclaim Defendant did not pay the property taxes on the Foreclosed Property in the time prescribed within the Sherrill Charter, it has lost all property rights with respect to the Foreclosed Property. Accordingly, Counterclaim Defendant has no right to remain on the Foreclosed Property, or act as if the Foreclosed Property in any way belongs to it.

52. Counterclaim Plaintiff Sherrill therefore requests a judgment evicting the counterclaim defendant from the Foreclosed property.

THIRD COUNTERCLAIM
(UNJUST ENRICHMENT)

53. Counterclaim Plaintiff Sherrill repeats and realleges paragraphs 29 through 43 with the same force and effect as if fully set forth herein.

54. The money Sherrill collects in property taxes is used to fund a number of municipal services which benefit the entire community. Sherrill's city managers and department heads initially determine how much money should be allocated for each of the municipal services provided to Sherrill residents. Thereafter, Sherrill's city commissioners must approve the budget and a public hearing must be held before the budget is finalized. The timely collection of property taxes by Sherrill is crucial in order to ensure that municipal service programs are adequately funded.

55. Sherrill residents who own real property are obligated by the Sherrill Charter to pay property taxes each year. In return, those residents receive the benefits of a plethora of municipal services, such as police and fire protection, garbage removal, road maintenance, and zoning enforcement and planning.

56. Notwithstanding the fact that Counterclaim Defendant refuses to pay the property taxes it owes on either the Foreclosed Property or Additional Property in Sherrill, it nonetheless accepts, without objection, the services that Sherrill provides to it. As a result of Counterclaim Defendant's conduct described above, Counterclaim Defendant has been, and continues to be, enriched at the expense of Sherrill's citizens.

57. Counterclaim Plaintiff Sherrill therefore requests a judgment in an amount to be determined at trial to reimburse Sherrill for services provided to Counterclaim Defendant but not paid for by it via property taxes.

FOURTH COUNTERCLAIM
(INJUNCTION)

58. Counterclaim Plaintiff Sherrill repeats and realleges paragraphs 29 through 43 with the same force and effect as if fully set forth herein.

59. Counterclaim Defendant has never paid the property taxes it owes to Sherrill on either the Foreclosed Property or the Additional Property.

Furthermore, it is apparent that should Counterclaim Defendant acquire additional property in Sherrill, it will likewise refuse to pay property taxes on the newly-acquired property. If Counterclaim Defendant is allowed to purchase additional property in Sherrill without paying taxes, the quality of life of law-abiding, tax-paying citizens of Sherrill will irreparably suffer due to a decrease in property tax revenue by Sherrill and the corresponding negative effect such a decrease in revenue will have on the quality and availability of critical municipal services. This injury is not compensable in money damages and Counterclaim Plaintiff has no adequate remedy at law.

60. Counterclaim Plaintiff Sherrill, therefore, requests a preliminary and permanent injunction prohibiting Counterclaim Defendant from purchasing additional properties, any part of which are located within the boundaries of Sherrill.

FIFTH COUNTERCLAIM
(INJUNCTION)

61. Counterclaim Plaintiff Sherrill repeats and realleges paragraphs 29 through 43 with the same force and effect as if fully set forth herein.

62. On February 9, 2000, pursuant to section 94-h of the Charter, Sherrill received a conveyance of the Foreclosed Property, and is recorded as the owner of the Foreclosed Property on the deed located at the Oneida County Clerk's Office. Counterclaim Defendant

remains in wrongful possession of the property, on which it runs a retail outlet as well as a factory that prints silkscreens on clothing. On February 15, 2000, Sherrill commenced eviction proceedings in the City Court of Sherrill.

63. If Counterclaim Defendant is permitted to build and/or expand upon the existing building structure, or erect new structures on the Foreclosed Property, the quality of life for law-abiding, tax-paying citizens of Sherrill will necessarily suffer when resources that would otherwise be utilized to provide critical services to those citizens will be used to correct the unauthorized expansion discussed above once Sherrill evicts Counterclaim Defendant and takes possession. This injury is not compensable in money damages and counterclaim plaintiff has no adequate remedy at law.

64. Counterclaim Plaintiff Sherrill, therefore, requests a preliminary and permanent injunction prohibiting Counterclaim Defendant from expanding and/or building upon the existing structure of the Foreclosed Property, and/or erecting new structures on said property.

REQUEST FOR RELIEF

65. Wherefore, Counterclaim Plaintiff the City of Sherrill respectfully requests that the Court enter judgments:

(a) dismissing the complaint;

(b) declaring that Sherrill may lawfully impose or seek to collect property taxes from Counterclaim Defendant based on the lands that appear on the tax rolls of Sherrill and that Sherrill's Charter applies to such properties, and declaring that Sherrill currently owns the Foreclosed Property;

(c) evicting Counterclaim Defendant from the Foreclosed Property;

(d) awarding an amount to Counterclaim Plaintiff, to be determined at trial, to reimburse it for Counterclaim Defendant's use and benefit of municipal services;

(e) preliminarily and permanently enjoining Counterclaim Defendant, its officers, agents, servants, employees and persons in active concert with it from purchasing any additional property within the boundaries of Sherrill;

(f) preliminarily and permanently enjoining Counterclaim Defendant, its officers, agents, servants, employees and persons in active concert with it from expanding or adding additional structures on the Foreclosed Property;

(g) attorneys' fees and costs; and

(h) such other and further relief which the court deems just and proper.

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Dated: February 24, 2000
New York, New York

Respectfully submitted,

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON
(A Partnership Including
Professional Corporations)

By: /s/
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Attorneys for the City of Sherrill

Of Counsel
Laura Sulem (admission pending)

APPENDIX Q — CITY OF SHERRILL'S NOTICE OF PETITION AND PETITION IN *CITY OF SHERRILL V. ONEIDA INDIAN NATION*, NO. C-00-615 (CITY CT. CITY OF SHERRILL), DATED FEBRUARY 15, 2000

STATE OF NEW YORK COUNTY OF ONEIDA,
CITY COURT CITY OF SHERRILL

File No. C-00-615

THE CITY OF SHERRILL, NEW YORK,

Petitioner,

vs.

ONEIDA INDIAN NATION OF NEW YORK,

Respondent.

NOTICE OF PETITION

TO THE RESPONDENT ABOVE NAMED:

PLEASE TAKE NOTICE, that the annexed Petition of Michael D Holmes as City Clerk of the City of Sherrill, duly verified by him on the 15th day of February, 2000, will be heard at a Term of this Court to be held at 377 Sherrill Road, Sherrill, New York, on the 24th day of February, 2000, at 1:15 PM or as soon thereafter as the parties or their respective counsel can be heard.

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PLEASE TAKE FURTHER NOTICE, that if you fail to appear on the date and time indicated in the preceding paragraph and interpose and establish any defense that you may have to this proceeding, an Order of Eviction may be entered against you by default, and you may be further precluded from asserting that defense or any claim you may have based on that defense in this proceeding or in any later proceeding or action.

PLEASE TAKE FURTHER NOTICE, if this notice is served on you at least eight (8) days prior to the return date specified above, demand is hereby made that you serve a copy of your Answer to the accompanying Petition upon the undersigned not less than three (3) days prior to such return date.

Dated: February 15, 2000.

City of Sherrill, New York

By: /s/_____
Michael D. Holmes,
City Clerk

/s/_____
Dennis K. McDermott, Esq.
Attorney for Petitioner
112 Farrier Avenue
Oneida, NY 13421-1637
(315) 363-3440

Appendix Q

STATE OF NEW YORK COUNTY OF ONEIDA,
CITY COURT CITY OF SHERRILL

File No. C-00-615

CITY OF SHERRILL, NEW YORK,

Petitioner,

vs.

ONEIDA INDIAN NATION OF NEW YORK,

Respondent.

PETITION

The Petition of the City of Sherrill, New York respectfully alleges and shows to the Court as follows:

1. The Petitioner is a municipal corporation of the State of New York, having its office at 377 Sherrill Road in the City of Sherrill, Oneida County, New York.

2. The City is the owner of certain commercial premises situate at and commonly known as 245 West Seneca Street in the said City of Sherrill, together with two adjoining vacant lots to the rear thereof and having frontage on Prospect Street, all of which property lies within the territorial jurisdiction of this Court. The improved parcel located at 245 West Seneca Street is designated on the tax map as SBL No. 322.014-1-23 and

the two unimproved parcels located on Prospect Street are designated as SBL No. 322.014-1-25 and 322.014-1-26. Title to the aforementioned parcels of land was acquired by the Petitioner through tax foreclosure and sale proceedings conducted under provisions contained in Title VIII of the Sherrill City Charter.

3. Upon information and belief, the Respondent above named, the Oneida Indian Nation of New York, is a corporate entity having its principal office located at Box 1, Route 5, Vernon, New York. The said Respondent was the fee owner of the aforementioned premises but its title thereto was extinguished upon the foreclosure of the tax lien thereon held by the Petitioner pursuant to the aforementioned provisions contained in the Sherrill City Charter.

4. On February 9, 2000, Michael D. Holmes, as City Clerk of the City of Sherrill, conveyed title to the aforementioned premises to the Petitioner City of Sherrill by Tax Sale Deed bearing such date and duly recorded on said date in the office of the Oneida County Clerk.

5. Section 94-h of the Sherrill City Charter provides, in pertinent part as follows:

> § 94-h. CONVEYANCE OF LANDS SOLD FOR TAXES. If any parcel or lot so sold shall not be redeemed as herein provided, the city clerk, immediately after the expiration of the said two years, shall execute and deliver to

the purchaser, his heirs or assigns, or to the city or its assigns, or to the persons finally redeeming, as the case may be, a conveyance of the real estate so sold, which conveyance shall vest in the grantee an estate in fee, subject only to the liens, if any, of unpaid taxes or assessment thereon....Every such conveyance shall be executed by the city clerk and the execution thereof shall be acknowledged before some officer authorized to take and certify acknowledgment of instruments for record in said county, and such conveyance shall be conclusive evidence that the sale and subsequent proceedings were regular and presumptive evidence that all the previous proceedings were regular and according to law. Any such conveyance may be recorded in like manner and with like effect as any other conveyance of real estate. *The said grantee or his assigns, or the city or its assigns, as the case may be, shall be entitled to have and possess the granted lands from and after the execution of such conveyance, and may cause the occupants of such lands to be removed therefrom and the possession thereof delivered to them in the same manner and by the same proceeding and by the same officer as in the case of a tenant holding over after the expiration of his term without permission of his landlord.* (Emphasis added).

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6. The Respondent is wrongfully holding over and continuing in possession of the premises without the Petitioner's permission.

WHEREFORE, the Petitioner respectfully demands Judgment herein awarding to it the possession of the premises and directing that a Warrant be issued to remove the Respondent, any and all persons claiming under the Respondent, and their possessions from the premises, and awarding to the Petitioner the costs and disbursements of this proceeding together with such other and further relief as may be just, proper and equitable.

Dated: February 15, 2000

City of Sherrill, New York

By: /s/
Michael D. Holmes,
City Clerk

/s/
Dennis K. McDermott, Esq.
Attorney for Petitioner
112 Farrier Avenue
Oneida, NY 13421-1637
(315) 363-3440

Appendix Q

STATE OF NEW YORK
COUNTY OF MADISON

MICHAEL D. HOLMES, being duly sworn, deposes and says that he is over 18 years of age, a resident of the City of Sherrill, New York, and that he is the City Clerk of said City of Sherrill; that he has read the foregoing Petition subscribed by him and that he is familiar with its contents; that the matters therein alleged are true to his knowledge except as to matters stated to be alleged upon information and belief, and as to those matters, he believes them to be true; this verification is made by him because the Petitioner, the City of Sherrill, New York, is a municipal corporation, and that he is an officer thereof, to wit, its City Clerk.

/s/
Michael D. Holmes

Sworn to before me this 15th day of February, 2000.

/s/
Notary Public

Dennis K. McDermott
Notary Public, State of New York
Appointed in Madison County
My Commission Expires August 31, 2001

APPENDIX R — ONEIDA INDIAN NATION'S COMPLAINT IN *ONEIDA INDIAN NATION V. CITY OF SHERRILL*, NO. 00-CV-223 (N.D.N.Y.), DATED FEBRUARY 4, 2000

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

CIVIL ACTION NO.

ONEIDA INDIAN NATION
Route 5
Vernon, New York 13476,

Plaintiff,

-vs-

CITY OF SHERRILL
377 Sherrill Road
Sherrill, New York 13461,

Defendant.

COMPLAINT

A. Nature of Action

1. The Oneida Indian Nation sues the City of Sherrill to stop Sherrill from further efforts to enforce its property tax laws with respect to Nation lands located in Sherrill. Sherrill has notified the Nation that, unless the Nation pays property taxes by February 8, 2000, Sherrill will take title to the Nations, lands and will evict

the Nation from possession of such lands. These lands are Oneida reservation lands in the Nation's actual possession, are Indian country, and are restricted against alienation. Sherrill's efforts to tax such lands and to interfere with the Nation's possession of them violates federal law.

B. Subject Matter Jurisdiction and Venue

2. Jurisdiction regarding the Nation's federal claims exists pursuant to 28 U.S.C. §§ 1331 & 1362 and 42 U.S.C. § 1983. Those claims arise under, and seek to preserve rights and immunities secured by, the Indian Commerce Clause (Art. I, § 8) and the Due Process Clause (Amend. XIV) of the United States Constitution, the Non-Intercourse Act, 25 U.S.C. § 177, the 1794 Treaty of Canandaigua, and federal common law protections of tribal sovereignty and prohibitions against taxation of tribal reservation land by states and their political subdivisions.

3. Jurisdiction regarding the Nation's state-law claims exists pursuant to 28 U.S.C. § 1367. Those claims are so related to the federal claims that they form part of the same case or controversy.

4. The Northern District of New York is an appropriate venue pursuant to 28 U.S.C. § 1391(b). Sherrill is in this district. The events giving rise to the Nation's claims occurred in this district. The real property that is the subject of this action is in this district.

C. Parties

5. Plaintiff Oneida Indian Nation is a federally recognized Indian tribe. 63 Fed. Reg. 71941 (Dec. 30, 1998).

6. Defendant City of Sherrill is a municipal corporation organized under the laws of the State of New York.

D. Facts

7. The Nation has two properties fronting on Route 5 in Sherrill. On one, the Nation has a textile manufacturing and distribution facility. On the other, the Nation has a gas station and convenience store. Sherrill has divided these properties into the following ten tax parcels: 322.014-1-23, 322.014-1-24, 322.014-1-25, 322.014-1-26, 322.015-2-1, 322.015-2-64, 322.015-2-65, 322.015.2-40.3, 322-015-2-45.1, 322-015-2-47.

8. These properties are located within and are part of the Oneida reservation recognized in the 1794 Treaty of Canandaigua. Neither the Congress of the United States, nor any other part of the Government of the United States, ever has modified the reservation status of these properties or made them subject to taxation by a state or local government.

9. Although the Nation's properties in Sherrill always have been part of the Oneida reservation, the Nation has not always had actual possession of them. In

1805, the State of New York caused these properties, which were part of a 100-acre parcel, to be transferred to an individual Nation member named Cornelius Dockstader. In 1807, the New York Legislature purported to grant Dockstader the right to sell the land, and Dockstader thereafter sold the land to a non-Indian named Peter Smith. Thereafter, the land was subdivided. The subdivided parcels, including the properties that are the subject of this action, were sold by one non-Indian to another over the years, such that, from 1805 until about 1997-98, the parcels were out of the Nation's actual possession.

10. None of the transactions, transfers or sales described in the previous paragraph complied with any of the federal participation and approval requirements of 25 U.S.C. § 177, and none was approved by any branch of the Government of the United States. All such transactions and transfers were in violation of federal law and were void *ab initio*, including the transactions and transfers involving the Sherrill properties, and the Nation never lost its possessory rights with respect to the Sherrill properties.

11. In 1997 and 1998, the Nation re-acquired actual possession of its properties in Sherrill by voluntary, free market transactions. Pursuant to these transactions, those non-Indians who were in actual possession agreed to leave and to give to the Nation possession and any other rights they had claimed in the properties.

12. The Nation's properties constitute reservation land and, therefore, Indian country within the meaning

of 18 U.S.C. § 1151. Further, the properties are subject to restrictions on alienation and encumbrance by virtue of the Non-Intercourse Act, 25 U.S.C. § 177. As reflected in Exhibit A, the United States Department of Interior has reviewed the status of a gas station on similar lands and has determined in response to an inquiry from the New York State Police that the lands "are owned by the Oneida Tribe of New York, cannot be alienated without the express approval of the United States, and are subject to Oneida tribal governmental power."

13. Notwithstanding the status of the Nation's properties as described in the previous paragraph, Sherrill, acting under color of state law, has sought to collect property taxes from the Nation with respect to its properties. The Nation has refused to pay those taxes on the ground that Sherrill's imposition of the taxes is illegal under federal law. The Nation has proposed a standstill agreement that would avoid the need for immediate litigation, without prejudice to the legal positions of the parties. Sherrill has ignored the Nation's objections, has rejected a standstill agreement, and has purported to auction the Nation's properties, which Sherrill itself has claimed to purchase at auction.

14. Sherrill is now seeking to bring the dispute to an immediate culmination by engaging in self-help and evicting the Nation from its properties. Specifically, Sherrill has notified the Nation that it will be evicted from three of the tax parcels if property taxes are not paid by February 8, 2000. As to each of those parcels, Sherrill's notice was in the form attached as Exhibit B.

It States:

> In accordance with Section 94.h of the City Charter, your property will be conveyed to the City of Sherrill on February 8, 2000, if you do not redeem this property by the date specified in the enclosed notice.
>
> After the execution of the conveyance to the City, the Charter provides that the occupants of such land be removed therefrom and possession thereof delivered to the City.

E. First Claim: Federal Prohibition of Property Taxation and Eviction

15. Paragraphs 1 through 14, above, are incorporated herein by reference pursuant to Fed. R. Civ. P. 10(c).

16. The Nation's properties in Sherrill (specifically identified in paragraph 7, above) are in the actual possession of the Nation, and the Nation has had a possessory right to those properties from time immemorial.

17. The Nation's properties are within the Oneida reservation that was confirmed and guaranteed by the 1794 Treaty of Canandaigua. The Treaty confirms the Nation's possessory right and guarantees the Nation the "free use and enjoyment" of its reservation. It precludes taxation of the Nation's reservation land.

Appendix R

18. The Nation's properties constitute reservation land and are Indian country within the meaning of 18 U.S.C. § 1151.

19. The Nation's properties are subject to the restrictions against alienation imposed by the Non-Intercourse Act, 25 U.S.C. § 177.

20. The Nation's properties in Sherrill are not subject to taxation by Sherrill. Article I, Section 8 of the United States Constitution reposes authority over commerce with Indians in the Congress of the United States. This authority is exclusive; it preempts the authority of states and their political subdivisions to impose taxes on tribal land within Indian country, including reservation land possessed by an Indian tribe. Further, in the absence of Congressional authorization to impose such taxes, efforts by states and their political subdivisions to do so is a violation of an Indian tribe's sovereign immunity.

21. Sherrill's efforts to impose property taxes on the Nation's properties and to coerce payment of those taxes by the Nation by encumbering and conveying those properties and by evicting the Nation from them:

a. violate the 1794 Treaty of Canandaigua;

b. violate Article I, Section 8 of the United States Constitution and federal common law, which give exclusive authority to Congress with respect to taxation of Indian land;

c. violate the Nation's sovereign immunity, which derives from Article I, Section 8 of the United States Constitution and from federal common law;

d. violate the Non-Intercourse Act, 25 U.S.C. § 177, in that Sherrill has not complied with any provision of the Act for federal involvement in and approval of a conveyance of an interest in the Nation's properties or of eviction of the Nation from them; and

e. violate 42 U.S.C. § 1983, in that, under color of state law, they deprive the Nation of rights, privileges and immunities secured by the United States Constitution and by the laws of the United States.

22. Accordingly, Sherrill has no right to tax, auction, transfer or sell the Nation's properties or to evict the Nation from its properties in Sherrill, and Sherrill's action are null and void.

F. Second Claim: Federal and State Due Process

23. Paragraphs 1 through 14, above, are incorporated herein by reference pursuant to Fed. R. Civ. P. 10(c).

24. Throughout Sherrill's efforts, taken under color of state law, to enforce its property tax laws with respect to the Nation's properties, Sherrill has failed to provide the Nation with the notices required to afford due process under the laws of the United States and under the laws of the State of New York.

25. Sherrill's initial notices of tax delinquency to the Nation referred to a tax delinquency but failed to identify the properties subject to the claimed delinquency.

26. Sherrill failed to serve the Nation with written notice with respect to Sherrill's tax sales of the Nation's properties that occurred on November 5, 1997, November 5, 1998 and November 10, 1999. Instead, Sherrill relied upon notice by publication, which was not sufficient.

27. Sherrill also failed to provide the Nation with two years' notice of the Nation's right to redeem its properties, although the Sherrill Charter provides for a two-year redemption period. Instead, Sherrill gave the Nation only three months' notice of its right to redeem, threatening to evict the Nation at the end of that three-month period. This belated notice of a truncated redemption period eliminated twenty-one months of the required two-year redemption period.

28. By virtue of the foregoing notice defects, Sherrill's efforts to deprive the Nation of its properties and to evict the Nation from them deprives the Nation of the due process rights secured by the constitution and laws of the United States and the laws of New York and are illegal, void and in violation of 42 U.S.C. § 1983.

G. Prayer for Relief

WHEREFORE, the Nation prays for entry of judgment in its favor and against Sherrill, awarding the Nation:

a. a declaration that Sherrill may not impose or seek to collect property taxes from the Nation based on the lands owned and possessed by the Nation within Sherrill, that the Nation and its lands are not subject to property taxation by Sherrill, that all of Sherrill's efforts heretofore to tax such lands are null and void, that all of Sherrill's purported conveyances, sales and auctions of - and notices of delinquency and liens on - such lands are null and void, that all of Sherrill's efforts to interfere with the Nation's ownership and possession of such land are null and void, and that Sherrill may not evict the Nation from or dispossess the Nation of its lands;

b. an injunction prohibiting Sherrill, its officers, agents, servants, employees and persons in active concert or participation with them, including Mayor Dwight Evans, City Manager David Barker and City Clerk Michael Holmes, from subjecting the Nation and its lands to property taxation, prohibiting them from any interference with the Nation's ownership and possession of its lands and from any effort to evict the Nation from such lands, and mandating that they void and rescind all notices, liens, sales, auctions, conveyances and other official documents or acts taken with respect to enforcement of the property tax laws as against the Nation and its lands;

c. attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and

d. such other relief to which the Nation may be entitled at law or in equity.

Appendix R

Dated: February 4, 2000

Respectfully submitted,

MACKENZIE SMITH LEWIS
MICHELL & HUGHES, LLP

BY: /s/

Peter D. Carmen
Bar Roll No. 501504
101 South Salina Street, Suite 600
P.O. Box 4967
Syracuse, New York 13221-4967
Telephone: (315) 233-8386
Facsimile: (315) 426-8358

-and-

ZUCKERMAN, SPAEDER,
GOLDSTEIN, TAYLOR &
KOLKER, LLP

BY: _____

William W. Taylor, III
Bar Roll No. 102710
Michael R. Smith
Bar Roll No. 601277
1201 Connecticut Ave., NW
Washington, D.C. 20036
Telephone: (202) 778-1832
Facsimile: (202) 822-8106

Attorneys for Plaintiff
Oneida Indian Nation

APPENDIX S — EXHIBIT B TO ONEIDA INDIAN NATION'S COMPLAINT IN *ONEIDA INDIAN NATION V. CITY OF SHERRILL*, LETTERS FROM THE CITY OF SHERRILL TO ONEIDA INDIAN NATION OF NEW YORK DATED NOVEMBER 8, 1999 AND JANUARY 10, 2000

CITY OF SHERRILL
377 Sherrill Rd.
Sherrill, N.Y. 13461
Telephone: (315) 363-2440
Fax: (315) 363-0031

[Illegible] Barker, City Manager
Michael D. Holmes, Comptroller/City Clerk
Kathyrn B. Rossella, Director of Finance
Keith Pitman, Supt. Power & Light
Gary Onyan, Supt. Public Works
Christopher Dunn, Supt. Waste Water Treatment

COMMISSIONERS
Dwight Evans, Mayor
Thomas White, Deputy Mayor
Brian Carroll
Wallace Glasgow
Keith Zupan

CITY OF SHERRILL

NOTICE OF REDEMPTION

Appendix S

FROM 1997

To: Oneida Indian Nation of New York
Tax Map # 322.014-1-26

PLEASE TAKE NOTICE that a sale of said lands, reputedly owned by you, for unpaid taxes was held by the undersigned on November 5, 1997, such lands were sold to the City of Sherrill, the highest bidder, and a tax sale certificate issued to the City. The last date for you to redeem such lands is February 8, 2000.

Dated: November 8, 1999

MICHAEL D. HOLMES
CITY CLERK

Appendix S

CITY OF SHERRILL
377 Sherrill Rd.
Sherrill, N.Y. 13461
Telephone: (315) 363-2440
Fax: (315) 363-0031

[Illegible] O. Barker, City Manager
Michael D. Holmes, Comptroller/City Clerk
Kathyrn B. Rossella, Director of Finance
Keith Pitman, Supt. Power & Light
Gary Onyan, Supt. Public Works
Christopher Dunn, Supt. Waste Water Treatment

COMMISSIONERS
Dwight Evans, Mayor
Thomas White, Deputy Mayor
Brian Carroll
Wallace Glasgow
Keith Zupan

January 10, 2000

Oneida Indian Nation of New York
Attn: Ray Halbritter
P.O. Box 1
Vernon, N.Y. 13476

Dear Mr. Halbritter:

In accordance with Section 94.h of the City Charter, your property will be conveyed to the City of Sherrill on February 8, 2000, if you do not redeem this property by the date specified in the enclosed notice.

Appendix S

After the execution of conveyance to the City, the Charter provides that the occupants of such land be removed therefrom and possession thereof delivered to the City.

Sincerely,

/s/
Michael D. Holmes
City Clerk

MDH:tmr
Enc.

APPENDIX T — TRANSCRIPTION OF SWORN AFFIDAVIT OF RANSOM GILLET, JANUARY 13, 1851

Being called upon, as the person who, as Commissioner on the part of the United States, negotiated the Treaty with the New York Indians of January 15, 1898, to give information as to the intent & meaning of the 13th article of that treaty, respecting the payment of the two sums of four & two thousand Dollars therein stipulated to be paid, I state that the several tribes or bands of those Indians being differently situated & having separate & different interests, it was found impracticable to have them join in a general treaty, without inserting special stipulations respecting each, & in some cases, respecting respecting [sic] particular individuals. Hence these several special stipulations vary in their provisions, according to the circumstances of each case. While some of the Indians agreed to cede their reservations at once, and remove to the west, others would not enter into such an arrangement. The Oneidas preferred holding on to their lands, until they could make their own arrangements with the state of New York for disposing of them, which they had a right to do. They would not agree to remove at all, except upon that contingency: they objected to any other stipulation upon the subject, lest they might be constrained to remove, and compelled to sacrifice their lands, or dispose of them disadvantageously. Hence, the peculiar stipulation in the 13th article of the treaty on the subject.

With respect to the sums, four thousand and two thousand Dollars, stipulated in the 13th article of the

treaty to be paid, the first is to Baptiste Powlis, & the Chiefs of the First Christian party, & the second to William Day & the Chiefs of the Orchard Party of the Oneidas, they were for just & bonafide claims which they had against the United States. It was originally contemplated, in the commencement of the policy of removing from within the limits of the states, to locate the New York Indians with those in Wisconsin, for which purpose it became necessary to obtain lands for them, from the Indians there. The Oneidas, St. Regis, & I think others, & certainly these two, were invited to take an active part in this policy. They aided & assisted in procuring a country from the Menominees & in inducing a portion of the New York Indians to go there & settle. They thus expended money & rendered valuable services, in aiding the government to carry out its policy, for which they had a valid claim against the United States. This claim they brought forward in the negotiations & insisted on its being recognized & provided for, & it was done accordingly, as an act of justice, as well as good policy. It was an entirely separate & independent arrangement, making provision for a subsisting & valid claim, & had no connection with the other contingent stipulation respecting their removal. According to the intent & meaning of the provision on the subject, the money was due & payable to them, on the ratification of the Treaty, & its being withheld is contrary to the intent of the treaty & to justice & good faith.

Appendix T

Washington. January 11, 1851 R.H. Gillet

District of Columbia
City and County of Washington

Ransom H. Gillet

of the City of New York having
duly sworn doth depose and say
that the facts stated in the foregoing
affidavit are true to the best of his
knowledge information & belief,
& that those relating to matters
with which he was personally
connected as Commissioner he knows
them to be true of his own knowledge

R.H. Gillet

Subscribed and sworn before me, this
13th day of January, 1851
[illegible] Barclay, JP

[Addendum]: Being called upon to say further what was the understanding in relation to the parties entitled to the sums stipulated in the 13th article of the treaty of 1838 & mentioned in the foregoing affidavit, I state that it was by Powlis & Day that the services referred to were mainly rendered, while the money expended was the money of the tribe. Those two individuals were

considered entitled to liberal shares of the money for their services & the remainder was to be payable to tribe through the Chiefs, whoever they might be, when the payment was made — in accordance with the customs which prevailed at the time the treaty was entered into, of making all payments through the Chiefs.

R.H. Gillet

[illegible]Commissioner

Washington, January 17, 1851

APPENDIX U — STATE OF NEW YORK REPORT OF THE COMMITTEE ON INDIAN AFFAIRS DATED MARCH 24, 1847

REPORT OF THE COMMITTEE
ON INDIAN AFFAIRS

STATE OF NEW YORK

No. 70

IN SENATE,

MARCH 24, 1847.

Report

Of the committee on Indian affairs, to which was referred the petition of Maris B. Pierce and others, of the Iroquois or Six Nations.

Mr. Folsom, from the committee on Indian affairs, to which was referred the petition of Maris B. Pierce and others, of the Iroquois or Six Nations, asking for aid in restoring to their homes a number of families now suffering from destitution in the western wilderness, makes the following

Report:

It appears from documents submitted to the consideration of the committee, that efforts have been made by interested persons to induce the Indians of this State, now residing on reservations secured to them by

our laws, to abandon their homes, and remove to lands west of the Mississippi. Representations were made from time to time, to the general government; that considerable numbers of them were disposed to emigrate, and measures were accordingly taken to effect their removal. An agent was appointed to make suitable provision for the emigrating party, but upon the express condition that unless at least two hundred and fifty were disposed to go, nothing further should be done. This was in the latter part of the year 1845. The required number not having been then obtained, the agent was informed by the department at Washington, that the measure must be abandoned; but a few days after, he made such representations as to induce the department to renew the attempt, and further instructions, together with the requisite funds, were sent to the agent for this purpose.

It soon appeared, however, that the representations of the agent were not well founded. The commissioner of Indian affairs, in his last annual report, states that "information afterwards received, rendered it very doubtful whether there were in fact more than a very few individuals disposed to emigrate; and as the subject had become one of much controversy and dissatisfaction among the Indians generally, commissioners were appointed is attend a general council of the tribe on the 2nd of June last, in order to ascertain the real wishes of the Indians, it being the determination of the department to abandon any further proceedings in the matter, should it appear on investigation by the commissioners, that there were not two hundred and

fifty who really wished to emigrate. The emigrating agent was duly notified of the appointment of these commissioners and the object, when, it appears, that instead of waiting the result of this investigation, and the further orders of the department, he went to work and collected all whom he could induce to join him, and started with them west. The number he afterwards reported to have taken west, was two hundred and fifteen; but as the sub-agent for the New York Indians reported that only one hundred and fifty-three of these Indians went with him, any beyond that number must have been from Canada, who, according to his instructions, should have been excluded.

No intelligence of these unauthorised proceedings was received, (continues the commissioner,) until the party was a considerable distance on the route, and hence there was not time sufficient for making those preliminary arrangements, which were requisite for their reception and comfortable accommodation in their new country. In consequence of this circumstance, and of the season being unusually warm and unhealthy, they have suffered considerably from sickness and death."

Such is the official statement of the manner in which the removal of these unfortunate Indians was conducted; which is fully confirmed by documents appended to the report of the commissioner, containing the instructions given to the agent, *Abraham Hogeboom*, who was the perpetrator of this inhuman outrage upon these unhappy descendants of a great and powerful nation. Their blood lies at his door; but the infamy of the

transaction is shared by others, whose cupidity is ever on the watch to despoil the red-man of the few acres of ground left to him by the bounty of the State.

The council called for the purpose of ascertaining the views of the Indians on the subject of emigration to the west, to which the commissioner refers, was convened at the Cattaraugus reservation, on the 2nd of June last. Messers. A. H. Tracy, and G. W., Clinton, of Buffalo, were appointed commissioners on the part of the general government, with instructions to inquire fully into the matter, and report the facts to the department. A delegation from the society of Friends, who have taken a kind interest in the welfare of the Indians for many years, was also present by invitation. The council consisted of the Indians of Cattaraugus, and of deputations of chiefs from all the other reservations. Mr. Osborne, the agent of the Seneca nation, and Hon. Thomas C. Love, one of the appraisers to value the lands ceded under the treaty of 1838, were also present by invitation.

Upon the council being duly organized, the United States agent opened the proceedings by explaining to the assembled chiefs the purposes for which they had been called together. He stated that their Great Father, the President of the United States, had directed them to be convened, in order that an opportunity might be afforded them to make known their wishes respecting the proposed emigration to the west of the Mississippi river. The council was then addressed by Governor Black-snake, the head Sachem of the Seneca nation,

residing on the Allegany reservation, an aged chief, whose head was whitened by the snows of more than ninety winters. He spoke as follows:

> "BROTHERS! This council being now opened by the agent, I wish to say a few words before we proceed further in the business. We are informed that there is present a commissioner of the United States, who has been appointed to ascertain our wishes in regard to emigrating to the west, and I perceive we also have with us, a committee of our friends the Quakers, who have come agreat distance to meet and confer with us. It is by the merciful providence of God that they have been preserved through their long journey, and I now on behalf of the Seneca Nation, express our thanks for their safe arrival. We hope that while they are with us they will be preserved, and that when they return, they will be protected and safely conducted to their homes, by the same good hand that brought them here.
>
> "MY BROTHER CHIEFS! I now wish to say a few words to you. I hope that whatever the officers of the government and our friends now here with us, may say to us, will be listened to with attention and deliberately considered. That in all your deliberations you may keep calm, and decide according to your best judgment. I hope your decisions may be wise, and that

all further dissentions among you will be reconciled and settled, and that hereafter all party contentions will be buried. If there be any who wish to emigrate, let them be permitted to do so, but my advice to you all is, that you remain and enjoy the comforts and advantages that are secured to you here. By emigrating, you will be exposed to many hardships and dangers. But still, I repeat, that I desire to leave every one to decide for himself."

The Hon. George W. Clinton then addressed the council on the part of the United States. He noticed the reception of their memorial by the government, and informed them that upon their own application the present council had been convened, and that its object was to afford them an opportunity to make known to the President their real wishes in regard to removing to the west. He stated that the government had no desire to influence their decision on this matter, but left them entirely at liberty to exercise their own free will in relation to it, and informed them if they wished to remove, they would be assisted in doing so, and that their annuities hereafter would be as punctually paid to them in the west, as they had always been at their present residences. On the other hand, he assured them if it was their preference to remain at their present settlements, they were at full liberty to do so, and would here be protected in all their rights.

The commissioner further observed that it was

reported, a considerable number of Indians had lately removed from the State of New York to the west, and he wished to be informed by the chiefs then present, what number had gone, and from what tribes and reservations they had emigrated.

The chiefs after some consultation among themselves, stated in reply, that they were not now prepared to answer these questions. They said it was true some Indians had lately gone west, but with the information then before them, they were unable to state with certainty either their number or the places from whence they had gone; they would however inquire into the matter, and when prepared, would give the information desired.

Upon this the council adjourned to the following day.

On the council being again convened, the chiefs were requested to make a report of the number of Indians who had lately emigrated, and also the number, if any, who desired to be removed to the west.

Jacob Blacksnake, a delegate from the Allegany Reservation, rose and stated, that before the business was further proceeded in, he wished to express his thanks to the Great Spirit, that he had permitted them at this time, to meet their brothers and sisters who were now present, and who had came so great a distance to see them. He then on behalf of the Allegany Reservation stated, that the chiefs on that reservation unanimously

wish to remain, and retain their present homes; they believed it to be their interest to do so, and have no intention or desire to remove. One lad had however put his name to an emigration paper, but he refused to go, and declared he never intended to emigrate.

Nathaniel Strong, on behalf of the Cattaraugus Reservation said,

> "I have been instructed by the chiefs of this reservation to report, that the number who have removed from here of our old settlers, was four men and not one woman; of these, one was a chief and the others were warriors; we know of no others on this reservation who desire to remove."

Jon Pierce, on behalf of the Buffalo chiefs stated, that the number of their Indians, including men, women and children who had gone west, was 58 Senecas, of which 6 were chiefs. It is not known that there are any others who desire to emigrate.

John Blacksmith, on behalf of the Tonawanda reservation said,

> "seven years ago, and again three years ago, the people on my reservation declared they did not wish to emigrate; they never signed any treaty to remove, and they have unanimously determined to remain where they are. And we understand from the United States commissioner, that we will be permitted

to do."

The commissioner of the United States here observed, that it was important there should be no misunderstanding of what he did say.

> "My business here is simply to ascertain how many Senecas wish to remove *west of the Mississippi*, and has no reference to the removal of the Tonawandas under the treaties of 1838 or 1842. The question now pending between them and the Ogden company must be settled elsewhere."

Peter Wilson, on behalf of the Cayugas, reported, that "41 of that tribe had left western New York for the west, of whom it was understood three had already returned.

(The Cayuga tribe is broken up and disorganized.) There are yet remaining of it, scattered over different parts of the State 89, of whose intentions regarding emigration we know nothing. There are spies among them, endeavoring to induce them to emigrate, and their chiefs have concluded not to interfere, but leave the few that remain to decide for themselves; of those who went two were chiefs.

John Blacksmith enquired if notice of the present council had been sent to the Tuskarora tribe? It was answered they had been notified, but that no delegation

was present from that settlement.

George Button, on behalf of the Onondagoes stated, that eight individuals of that tribe had gone west, two of whom were chiefs, and that none others wished to emigrate.

Nathaniel Strong asked leave to amend his report; he stated

> "he had just been informed that three individuals in addition to those heretofore reported, had gone from Cattaraugus, one woman and two children; they were strangers lately arrived there, and their former residence or tribe was not known."

Thomas Jamieson said he knew three of the emigrants were strangers here, and were from Green Bay.

Israel Jamieson then addressed the council as follows:

> "BROTHERS! The question relative to emigration being disposed of, I will explain the manner in which this removal of Indians to the west has been effected. I believe it was irregularly conducted. Indeed I may say of this, I am convinced. The agent who came to execute it, was duly notified that the

government had called the present council for the consideration and investigation of this matter. As soon as it was known that this had been determined on, great efforts were made to hurry off the emigrants, and induce them to leave before the council would meet. I am satisfied that many were decoyed away by various unfair contrivances, and gross misrepresentations on the part of the emigrating agent and his emissaries; I myself remonstrated against these proceedings, and asked if it could be proper to inveigle and deceive the Indians in this manner? In reply I was desired to be silent, to which I rejoined, that many of them who they had decoyed on board the boat, were then drunk and in a state of unconscious insensibility! Those remonstrances availed nothing, and the whole were hurried away. If any showed an unwillingness to go, they were told they might return if they chose, should they not like the place when they got there."

The information deemed necessary relative to the subject of emigration being now received, that subject was closed by a few remarks on the part of the United States commissioner. He stated that from what had here appeared, it was manifestly clear there really was at this time no emigration party among them; all who desired to go west, having already gone, and that he should so report to the government."

Such was the result of the council; and the

President was accordingly advised by the commissioner, that there was no wish on the part of the New York Indians to emigrate to the west.

But in the meantime, the party of men, women and children, hastily collected by Hogeboom and flattered with hopes he must have known would prove delusive, had already been hurried away from their homes without any adequate provision for their comfort or safety. Their number has been variously estimated at from one hundred and thirty-five to two hundred, consisting of sixty-two Senecas, about forty Tuscaroras, and the remainder composed of Oneidas, Cayugas, Onondagas, and other aboriginal tribes of this State. The country to which they were transported, lies near the south-western confines of the State of Missouri, more than two hundred miles west of the Mississippi, where they arrived about the middle of June last. Instead of the abundant supplies provided them on their arrival at that place, they were immediately abandoned to a most deplorable state of destitution and suffering, which cannot be described. The effects of the climate during the heats of summer, added to their miseries, and disease and death soon spread their ravages among these helpless outcasts. A letter from an intelligent gentleman, addressed to the editor of the *St. Louis Republican*, in November last, and dated in the Osage nation, on the southern border of the territory designed for the New York Indians, has the following account of them:

> "We have on our border, and near us, an unfortunate band of badly treated Indian

emigrants. They are portions of the *Six Nations* of New York. They were sent here by government, according to treaty stipulations. Their treatment, suffering and condition, cannot be described. I have said they were from New York. They were brought here by the government agents in June last, but with promises that money should be paid them on their arrival here. By the treaty, they were to have houses, fields, mills, churches, school-houses, and other comforts erected for and extended to them. But up to this time, [Nov. 29th last,] they have not received a dollar of money, nor has a cabin, to say nothing of a house, been erected; no churches, nor school-houses, have been prepared, nor has a field been opened. The consequences are easily told. Of the whole number, *more than one-half have been consigned to their mother earth*, while those who survive, are borne down by sickness and the loss of so many friends." The writer adds: "There is something wrong in the proceedings towards these wretched Indians, and someone should be made to suffer, and account for their wrongs. The interposition of the independent press is invoked, and I ask the whole country to see that the stain is removed from the national honor."

Such were the feelings of honest indignation excited in the breast of a stranger, who only knew these

unfortunate people from being an eyewitness of their destitution and distress; what then should be the reflections, and how acute the sympathies, of their kindred and friends, whom they had left behind in the enjoyment of all necessary comforts around the ancient council fires of their nation! And what should be the feelings of the white men, whose cupidity had involved these inoffensive children of nature in so much calamity and woe.

Two or three families of their number have found means to return; one family of Senecas started on their return in about a week after their arrival at the place of their destination in the west. On the 7th of October last, another family of seven persons left, and reached the reservation with the loss of one of their number by death on the way, and the survivors have scarcely yet recovered from the effects of this ill-fated enterprise. The whole number reported to have died, is sixty-one, among whom were two leading chiefs. This mortality has been occasioned by the unhealthiness of the climate, combined with the horrible state of destitution to which they were abandoned by those who had charge of them.

The remaining families, unable from want of means to reach their homes in this State, are doomed to renewed scenes of disease and death during the approaching season, unless this Legislature shall interpose for their rescue by making a small appropriation in their behalf. Your committee are fully impressed with the conviction, that something should be done to terminate their sufferings by enabling them

to rejoin their kindred and friends on the reservations in this State. The claim is a just one on the general government, as the removal was effected by its agent without making the necessary provisions for a long and toilsome journey, or for their subsistence and comfort after the arrival of the emigrating party at the place assigned them in the wilderness of the far west. A much larger sum is due them on those accounts from the general government than would be sufficient for their restoration. The number of persons to be restored to their homes in about eighty, and the expenses that would be incurred in their restoration, is estimated at not less than twenty-five dollars for each person. The small sum of two thousand dollars is all, therefore, that would be required for this purpose. Should this sum be advanced by the State, there is reason to believe it would be hereafter refunded by the nation of Congress.

The State is properly the guardian of the Indians remaining within its borders, and in the exercise of the duties and obligations devolved upon it by this relation, the Legislature has, from time to time, enacted laws for their protection and relief. When wronged or oppressed by the encroachments of our people, they have been accustomed to look to the State government for redress, and in most cases it has been cheerfully granted. But after all, the descendants of the original lords of the soil within this State have received but a poor indemnity for what has been wrested from them by the rapacity of our people. Of the ample domain, in the quiet possession of which the original European settler found the formidable confederacy of the Five Nations, stretching

from the banks of the Hudson to the Falls of Niagara, how small a fragment has been conceded to the wants of those remaining upon their lands at the present day! Well may we regard it as a sacred duty to protect them in the enjoyment of the little reserved for their use, when we consider for how trifling a consideration their title has been extinguished to nearly the whole territory of our State.

The present case calls loudly for the interposition of the Legislature. Duped and cheated by false representations, a considerable number of these children of the forest have been beguiled from their homes into an unhealthy region of the far west, and there left to perish, a prey to famine and disease. We are called upon as their guardians to provide for their immediate restoration to their homes, from which they were unlawfully abducted. It is the dictate both of humanity and justice, to afford the desired relief; and the appeal cannot be disregarded without doing violence to the character of our State as the tutelary guardian of the feeble remnant of the red-men within its borders.

The committee would therefore recommend an appropriation of two thousand dollars for this purpose, and ask leave introduce the accompanying bill.

APPENDIX V — LETTER BY JAMES YOUNG DATED JANUARY 18, 1839

LETTER

On page 68 appears the following:

"No. 8.

Washington, January 11th 1839.

Sir:

I have the honor herewith to hand you a copy of the treaty of January 15th 1838 with the New York Indians, as amended by the resolutions of the Senate of the 11th of June last, together with the assents of those obtained to those amendments. You have heretofore received a full report of all that transpired prior to your instructions of the 30th of October last. On the receipt of those instructions I repaired to Buffalo, New York for the purpose of carrying them into effect. On my arrival there I was joined by General H.A.S. Dearborn, the Superintendent appointed by the Governor of Massachusetts who continued with me until the close of my visit there. He was present and witnessed every signature to the assent except one which was taken while he was confined to his room by indisposition.

Soon after my arrival at Buffalo I directed the United States sub-agent resident there to give public notice to the Seneca chiefs that I was present and authorized to receive the signatures of such of their chiefs as desired to give them, and that the

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Superintendent for Massachusetts was also present to discharge the duty assigned him by the authorities of his State. After this notice ten additional names were received to the Seneca assent, making in all forty-one. Seven of these ten had previously signed separate assents containing powers of attorney to execute such further papers as might be necessary to give validity to their assents. These papers were all approved and acknowledged according to the usual forms under the laws of New York. Five of this number personally came before me and signed the assent attached to the treaty. The other two signed by attorney. The reasons why they did not appear and sign in person are stated in two affidavits which I hand you marked No. 1 and No. 2. From the character of the affidavits and the information verbally communicated to me by several respectable chiefs, I have no doubt that the affidavits are strictly true.

According to the statement of the Honorable James Stryker, Sub-agent of the New York Indians, dated March 29th, 1838, now in your office, and the further statement of the seven Seneca delegates who were then here, there were at that time in all eighty one Seneca chiefs. To this communication of Judge Stryker is added a communication containing the names of the chiefs. Subsequently three of these chiefs, to wit, George White, Captain Jones and Captain Jack Snow, died as appears by two affidavits of persons known to me to be respectable, marked No. 3. Their places have been filled by Charles Greybeard, John Hutchinson and Charles F. Pierce, as appears by three communications which I hand you marked No. 4, No. 5 and No. 6.

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From the high character of the principal chiefs whose names are signed to the first two of these papers, I place implicit confidence in their statements and I have no reason to doubt that they have truly stated the facts relative to the official character of these men. To these four names may be added that of James Shongo, who signed the assent attached to the printed copy of the treaty now in your possession, making in all forty two names, being a majority of three. Without the name of James Shongo there is a majority of one.

In every instance where a signature was received either General Dearborn or I distinctly inquired of the person offering to sign whether he fully understood the subject and whether he freely and voluntarily signed the assent. In each case distinct affirmative answer was given.

I visited such places on the reservation as I was desired to by any of the chiefs. Eight of the signatures were received at my lodgings in Buffalo, one at my former lodgings on the Buffalo Creek reservation and one at the residence of the sub-agent.

This, in connection with my former report constitutes all the facts known to me which are relevant and at all important to a right understanding of this subject. They will enable you to pass upon all the points which I think can properly grow out of it. I take the liberty of suggesting that in considering the subject it may be proper to advert to a communication of James S. Wadsworth Esquire to me, now on file in your office,

in which he distinctly offers life leases to all who desire them. This in effect, so far as the purchasers are concerned, change the character of the transaction and makes the arrangement substantially one with the emigration party alone. All removals under it will be voluntary and all who desire to spend their days on the land now occupied by them can do so. The rising generation, however, would not be embraced in the Provisions of that proposition and would have to seek homes in their new country. I have not that communication before me and consequently speak from memory. If I am in error as to its contents you can, by reference to it, correct me. How much importance should be attached to this consideration you can best determine.

Prior to leaving Buffalo I received a message from the venerable Captain Pollard who is confined to his bed by an excrutiating disease, desiring me to come to see him. The character of this man is described by Col. Stone, the biographer of Joseph Brant, in a letter published in December number of the Democratic Review. For bravery in war, wisdom in council and honesty and integrity in all the transactions of life Captain Pollard has no superior among the New York Indians and probably not in the tribes on the continent. I give you this description of him because he desires me to communicate to you the talk which he made me when I visited him, which I did a day or two before I left in company with the United States interpreter, N.T. Strong a Seneca chief. I found him unable to leave his bed but his mind seemed to be as lucid and vigorous. I have

reduced this communication as far as memory will permit to writing and attach it to this report. It is due to me that his speech has lost much of its force and attractiveness by being translated and spread upon paper. I will only add that his reasons carry conviction to my mind which further reflection has not effaced.

While on the Buffalo reservation a Cayuga agent, who was confined to his house by sickness, desired permission to place his name on the Cayuga assent which I had with me. I permitted him to do so and the names of James Young, the head chief of the Cayuga Nation, will be found to that paper in his own handwriting.

I understood another Cayuga chief wished to add his name also but I did not see him and consequently he had no opportunity to do so.

While at Buffalo General Dearborn showed me a letter from Governor Everett relative to the mode in which I had been instructed to perform my official duty and desired me to give him my views on the points which had been raised. You have doubtless received a copy of the Governor's letter. Although my letter to General Dearborn was not official, still I think you ought to know its contents, and therefore, I hand a copy of it to you, and it is marked No. 7.

Your obedient servant,

R. H. Gillet.

To Hon. T. Hartley Crawford,
Commissioner of Indian Affairs.

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(Then follows the substance of a talk by Capt. Pollard which occupies the remainder of pages 70, 71 and 72 of "Confidential B.," and at the top of page 73 appears the following:)

The treaty as amended was enclosed herewith, with the following additional signatures:

Senecas:	LITTLE JOHNSON	His x mark
	SAMUEL WILSON	His x mark
	JOHN BARK	His x mark
	WILLIAM CROSS	His x mark
	LONG JOHN	His x mark
	SKY CARRIER	His x mark
	CHARLES GREYBEARD	His x mark
	JOHN HUTCHINSON	His x mark
	CHARLES PIERCE	
	JOHN SNOW	His x mark

These ten chiefs signed in my presence except the last John Snow. H.A.S. Dearborn Superintendent of Mass. Signed in the presence of Nathaniel T. Strong, U.S. Interpreter, James Stryker, U.S. Agent.

GEORGE KENJUQUIDE His x mark

By his attorneys N.T. STRONG and WHITE SENECA
His x mark

The signature of George Kenququide was added by his attorneys in our presence.

R.H. GILLET, JAMES STRYKER.

18th of January 1839.

Cayuga. JAMES YOUNG

APPENDIX W — TRANSCRIPTION OF AUGUST 9, 1838 STATEMENT OF RANSOM H. GILLET AT ONEIDA CASTLE

To the chiefs, headmen & warriors of the Oneida Indians in New York

In order to prevent all [resistance?] and to counteract all misapprehensions concerning the purport of the treaty concluded between the United States and the New York Indians at Buffalo Creek on the 15th day of January 1838 & which was ratified by the Senate of the United States with amendments which have been this day assented to by by [sic] the Oneidas at Oneida Castle I hereby most solemnly assure them that the treaty does not and is not intended to compel the Oneidas to remove from their reservation in the State of New York to the west of the State of Missouri or elsewhere unless they shall hereafter voluntarily sell their lands where they reside & agree to do so. They can if they choose to do so remain where they are forever. The treaty gives them lands if they go to them & settle there but they need not go unless they wish to. When they wish to remove they can sell their lands to the Governor of the State of New York & then emigrate. But they will not be compelled to sell or remove.

Dated at Oneida Castle
August 9, 1838

RH Gillet
Commissioner

I certify that the above
was signed by the
Commissioner of the
United States
In my presence

Timothy Jenkins

APPENDIX X — TREATY AGREEMENTS

1788 TREATY OF FORT SCHUYLER, SEPTEMBER 22, 1788

STATE TREATY WITH THE ONEIDA INDIANS, 1788.

At a treaty held at Fort Schuyler, formerly called Fort Stanwix in the State of New York, by his Excellency George Clinton, Governor of the said State, and William Floyd, Ezra L'Hommedieu, Richard Varick, Samuel Jones, Egbert Benson and Peter Gansevoort, Junr. (Commissioners authorized for that purpose by and on behalf of the People of the State of New York) with the Tribe or Nation of Indiana called the Oneidas – it is on the twenty-second day of September, in the year one thousand seven hundred and eighty-eight, covenanted and concluded as follows:

First, the Oneidas do cede and grant all their lands to the people of the State of New York forever.

Secondly, of the said ceded lands the following tract to wit: Beginning at the Wood Creek opposite to the mouth of the Canada Creek, and where the line of property comes to the Said Wood Creek, and runs thence southerly to the north-west corner of the tract to be granted to John Francis Perache, thence along the westerly pounds of the said tract to the south-west corner thereof, thence to the north-west corner of a tract granted to James Dean; thence along the westerly bounds thereof to the south-west corner 6' of last mentioned tract; thence due south until it intersects a

due west line from the bead of the Tianaderha or Unadilla River; thence from the said point of intercession due west until the Deep Spring bears due North; thence due North to the Deep Spring, thence the nearest course to the Caneserage Creek, and thence along the said Creek the Oneida Lake and the Wood Creek to the place of beginning, shall be reserved for the following several uses. That is to say, the lands lying to the northward on a line parallel to the southern line of the said reserved lands, and four miles distant from the said Southern line, the Oneidas shall hold to themselves and their posterity forever for their own use and cultivation, but not to be sold, leased or in any other manner aliened or disposed of to others. The Oneidas may from time to time forever make leases of the lands between the said parallel line (being the residue of the said reserved lands) to such persons and on such rents reserved as they shall deem proper; but no lease shall for a longer term than twenty-one years from the making thereof; and no new lease shall be made until the former lease of the same lands shall have expired. The rents shall be to the use of the Oneidas and their posterity forever; and the people of the State of New York shall from time to time make provision by law to compel the lessees to pay the rents, and in every other respect to enable the Oneidas and their posterity to have the full benefit of their rights so to make leases and to prevent frauds on them respecting the same; and the Oneidas and their posterity forever shall enjoy the free right of hunting in every part of the said ceded lands, and of fishing in all the waters within the same, and especially there shall forever remain ungranted by the people of

the State of New York one half mile square at the distance of every six miles of the lauds along the northern banks of the Oneida Lake, one half mile in breadth of the lands on each side of the Fish Creek, and a convenient piece of land at the fishing place in the Onondaga River about three miles from where it issues out of the Oneida Lake, and to remain as well for the Oneidas and their posterity as for the inhabitants of the said State to land and encamp on. But notwithstanding any reservation to the Oneidas, the people of the State of New York may erect public works and edifices as they shall think proper at such place and places at or near the confluence of the Wood Creek and the Oneida Lake as they shall elect and may take and appropriate for such works or buildings lauds to the extent of one square mile at each place; and further notwithstanding any reservations of lands to the Oneidas for their own use, the New England Indiana (now settled at Brothertown under the pastoral care of the Rev. Samson Occom and their posterity forever, and the Stockbridge Indians and their posterity forever are to enjoy their settlements on the lands heretofore given to them by the Oneidas for that purpose, that is to say, a tract of two miles in breadth and three miles in length for the New England Indiana, and a tract of six miles square for the Stockbridge Indiana.

Thirdly, in consideration of the Raid Cession and Grant, the People of the State of New York do at this treaty pay to the Oneidas two thousand dollars in money, two thousand dollars in clothing and other goods, and one thousand dollars in provisions; and also five hundred

dollars in money to be applied towards building a grist milt and saw mill at their village (the receipt of which moneys, clothing and goods and provisions the Oneidas do now acknowledge), and the People of the State of New York shall annually pay to the Oneidas and their posterity forever on the first day of June in every year at Fort Schuyler aforesaid six hundred dollars in silver, but it the Oneidas or their posterity shall at any time hereafter elect that the whole or any part of the said six hundred dollars shall be paid in clothing or provisions, and give six weeks previous notice thereof to the Governor of the said State for the time being, then so much of the annual payment shall for that time be in clothing or provisions as the Oneidas and their posterity shall elect, and at the price which the same shall cost the people of the State of New York at Fort Schuyler aforesaid and as a further consideration to the Oneidas the people of the State of New York shall grant to the Raid John Francis Perache a tract of land, beginning in the line of property at it certain cedar tree near the road leading to Oneida and runs from the Raid cedar tree southerly along the line of property two miles; thence westerly at right angles to the said line of property two miles; thence northerly at right angles to the last course two miles, and thence to the place of beginning; which the said John Francis Perache hath consented to accept from the Oneidas in satisfaction for an injury done to him by one of their Nation. And further, the lands intended by the Oneidas for John T. Kirkland and for George IV. Kirkland, being now appropriated to the use of the Oneidas, the people of the State of New York shall therefore, by a grant of other

lands make compensation to the said John T. Kirkland and George W. Kirkland. And further, that the people of the State of New York shall as a benevolence from the Oneidas to Peter Penet and in return for services rendered by him to their Nation, grant to the said Peter Penet of the Raid ceded lands lying to the northward of the Oneida Lake a tract of ten miles square, wherever he shall elect the same.

Fourthly, the people of the State of New York may in such manner as they shall deem proper, prevent any persons except the Oneidas, from residing or settling on the lands so to be held by the Oneidas and their posterity for their use and cultivation, and if any person shall without the consent of the People of the State of New York come to reside or settle on the said lands or any other of the lands so ceded as aforesaid, except the lands whereof the Oneidas may make leases as aforesaid, the Oneidas and their posterity shall forthwith give notice of such intrusions to the Governor of the said state, for the time being. And further, the Oneidas and their posterity forever shall at the request of the Governor of the Raid State be aiding to the people of the State of New York in removing all such intruders and in apprehending not only such intruders but also felons, and other offenders who may happen to be on the said ceded lands, to the end that such intruders, felons and other offenders may be brought to justice.

In testimony thereof as well the sachems chiefs, warriors and others of the said Oneidas in behalf of their tribe or Nation its the said Governor and other commissioners

of the People of the State of New York, have hereunto interchangeably set their hands and affixed their seals the day and year first above written.

ODAGHSEGHTE
KANAGHGWEYA

* * * *

1794 TREATY OF CANANDAIGUA, NOVEMBER 11, 1794

Preamble of the Canandaigua Treaty

A Treaty Between the United States of America and the Tribes of Indians Called the Six Nations:

The President of the United States having determined to hold a conference with the Six Nations of Indians for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the sachems and warriors of the Six Nations in general council: Now, in order to accomplish the good design of this conference, the parties have agreed on the following articles, which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations . . . .

Appendix X

ARTICLE 1. Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

ARTICLE 2. The United States acknowledge the lands reserved to the Oneida, Onondaga, and Cayuga Nations in their respective treaties with the State of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them, or either of the Six Nations, nor their Indian friends, residing thereon, and united with them in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE 3. The land of the Seneca Nation is bounded as follows: beginning on Lake Ontario, at the northwest corner of the land they sold to Oliver Phelps; the line runs westerly along the lake, as far as Oyongwongyeh Creek, at Johnson's Landing Place, about four miles eastward, from the fort of Niagara; then southerly, up that creek to its main fork, continuing the same straight course, to that river; (this line, from the mouth of Oyongwongyeh Creek, to the river Niagara, above Fort Schlosser, being the eastern boundry of a strip of land, extending from the same line to Niagara River, which the Seneca Nation ceded to the King of Great Britain, at the treaty held about thirty years ago, with Sir William Johnson;) then the line runs along the Niagara River to Lake Erie, to the northwest corner of a triangular piece of land, which the United States

conveyed to the State of Pennsylvania, as by the President's patent, dated the third day of March, 1792; then due south to the northern boundary of that State; then due east to the southwest corner of the land sold by the Seneca Nation to Oliver Phelps; and then north and northerly, along Phelps' line, to the place of beginning, on the Lake Ontario. Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneca Nation; and the United States will never claim the same, nor disturb the Seneca Nation, nor any of the Six Nations, or of their Indian friends residing thereon, and united with them, in the free use and enjoyment thereof; but it shall remain theirs, until they choose to sell the same, to the people of the United States, who have the right to purchase.

ARTICLE 4. The United States have thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senecas, and engaged never to claim the same, not disturb them, or any of the Six Nations, or their Indian friends residing thereon, and united with them, in the free use and enjoyment thereof; now, the Six Nations, and each of them, hereby engage that they will never claim any other lands, within the boundaries of the United States, nor ever disturb the people of the United States in the free use and enjoyment thereof.

ARTICLE 5. The Seneca Nation, all others of the Six Nations concurring cede to the United States the right of making a wagon road from Fort Schlosser to Lake

Erie, as far south as Buffalo Creek; and the people of the United States shall have the free and undisturbed use of this road for the purposes of traveling and transportation. And the Six Nations and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbors and rivers adjoining and within their respective tracts of land, for the passing and securing of vessels and boats, and liberty to land their cargoes, where necessary, for their safety.

ARTICLE 6. In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations; and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established strong and perpetual, the United States now deliver to the Six Nations, and the Indians of the other nations residing among them, a quantity of goods, of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars heretofore allowed to them by an article ratified by the President, on the twenty-third day of April, 1792, making in the whole four thousand five hundred dollars; which shall be expended yearly, forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils, suited to their circumstances, and in compensating useful artificers, who shall reside with or near them, and be

employed for their benefit. The immediate application of the whole annual allowance now stipulated, to be made by the superintendent, appointed by the President, for the affairs of the Six Nations, and their Indian friends aforesaid.

ARTICLE 7. Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and the Six Nations agree, that for injuries done by individuals, on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party injured, to the other; by the Six Nations or any of them, to the President of the United States, or the superintendent by him appointed; and by the superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the Nation to which the offender belongs; and such prudent measures shall then be pursued, as shall be necessary to preserve or peace and friendship unbroken, until the Legislature (or Great Council) of the United States shall make other equitable provision for that purpose.

NOTE: It is clearly understood by the parties to this treaty, that the annuity, stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations, and of their Indian friends united with them, as aforesaid, as do or shall reside within the boundaries of the United States; for the United States do not interfere with nations, tribes or families of Indians, elsewhere resident.

Appendix X

IN WITNESS WHEREOF, the said Timothy Pickering, and the sachems and war chiefs of the said Six Nations, have hereunto set their hands and seals.

Done at Canandaigua, in the State of New York, in the eleventh day of November, in the year one thousand seven hundred and ninety-four.

TIMOTHY PICKERING

Witnesses
Interpreters
Israel Chapin Horatio Jones
Wm. Shepard Jun'r Joseph Smith
James Smedley Jasper Parrish
John Wickham Henry Abeele
Augustus Porter
James H. Garnsey
Wm. Ewing
Israel Chapin, Jun'r

(Signed by fifty-nine Sachems and War Chiefs of the Six Nations.)

CANANDAIGUA, NEW YORK – NOVEMBER 11, 1797

Native American Name English Translation
Handsome Lake
Capt. Key
Woods On Fire
Fish Carrier
Farmer's Brother or Nicholas Kusick
Red Jacket

Appendix X

Two Skies Of A Length
Broken Axe
Open The Way or Handsome Lake
Heap Of Dogs
Half Town or Jake Stroud
Stinking Fish
Capt. Prantup or Cornplanter
Green Grasshopper or Big Sky or Little Billy

* * * *

1838 TREATY OF BUFFALO CREEK, JANUARY 15, 1838

Articles of a treaty made and concluded at Buffalo Creek in the State of New York, the fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, by Ransom H. Gillet, a commissioner on the part of the United States, and the chiefs, head men and warriors of the several tribes of New York Indians assembled in council witnesseth:

WHEREAS, the six nations of New York Indians not long after the close of the war of the Revolution, became convinced from the rapid increase of the white settlements around, that the time was not far distant when their true interest must lead them to seek a new home among their red brethren in the West: And whereas this subject was agitated in a general council of the Six nations as early as 1810, and resulted in sending a memorial to the President of the United States, inquiring whether the Government would

consent to their leaving their habitations and their removing into the neighborhood of their western brethren, and if they could procure a home there, by gift or purchase, whether the Government would acknowledge their title to the lands so obtained in the same manner it had acknowledged it in those from whom they might receive it; and further, whether the existing treaties would, in such a case remain in full force, and their annuities be paid as heretofore: And whereas, with the approbation of the President of the United States, purchases were made by the New York Indians from the Menomonie and Winnebago Indians of certain lands at Green Bay in the Territory of Wisconsin, which after much difficulty and contention with those Indians concerning the extent of that purchase, the whole subject was finally settled by a treaty between the United States and the Menomonie Indians, concluded in February, 1831, to which the New York Indians gave their assent on the seventeenth day of October 1832: And whereas, by the provisions of that treaty, five hundred thousand acres of land are secured to the New York Indians of the Six Nations and the St. Regis tribe, as a future home, on condition that they all remove to the same, within three years, or such reasonable time as the President should prescribe: And whereas, the President is satisfied that various considerations have prevented those still residing in New York from removing to Green Bay, and among other reasons, that many who were in favour of emigration, preferred to remove at once to the Indian territory, which they were fully persuaded was the only permanent and peaceful home for all the Indians. And they therefore applied to

the President to take their Green Bay lands, and provide them a new home among their brethren in the Indian territory. And whereas, the President being anxious to promote the peace, prosperity and happiness of his red children, and being determined to carry out the humane policy of the Government in removing the Indians from the east to the west of the Mississippi, within the Indian territory, by bringing them to see and feel, by his justice and liberality, that it is their true policy and for their interest to do so without delay.

Therefore, taking into consideration the foregoing premises, the following articles of a treaty are entered into between the United States of America and the several tribes of the New York Indians, the names of whose chiefs, head men and warriors are hereto subscribed, and those who may hereafter give their assent to this treaty in writing, within such time as the President shall appoint.

GENERAL PROVISIONS.

ARTICLE 1.

The several tribes of New York Indians, the names of whose chiefs, head men, warriors and representatives are hereunto annexed, in consideration of the premises above recited, and the covenants hereinafter contained, to be performed on the part of the United States, hereby cede and relinquish to the United States all their right, title and interest to the lands secured to them at Green Bay by the Menomonie treaty of 1831, excepting

the following tract, on which a part of the New York Indians now reside: beginning at the southwesterly corner of the French grants at Green Bay, and running thence southwardly to a point on a line to be run from the Little Cocaclin, parallel to a line of the French grants and six miles from Fox River; from thence on said parallel line, northwardly six miles; from thence eastwardly to a point on the northeast line of the Indian lands, and being at right angles to the same.

ARTICLE 2.

In consideration of the above cession and relinquishment, on the part of the tribes of the New York Indians, and in order to manifest the deep interest of the United States in the future peace and prosperity of the New York Indians, the United States agree to set apart the following tract of country, situated directly west of the State of Missouri, as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes, which said country is described as follows, to wit: Beginning on the west line of the State of Missouri, at the northeast corner of the Cherokee tract, and running thence north along the west line of the State of Missouri twenty-seven miles to the southerly line of the Miami lands; thence west so far as shall be necessary, by running a line at right angles, and parallel to the west line aforesaid, to the Osage lands, and thence easterly along the Osage and Cherokee lands to the place of beginning to include one million eight hundred and twenty-four thousand

acres of land, being three hundred and twenty acres for each soul of said Indians as their numbers are at present computed. To have and to hold the same in fee simple to the said tribes or nations of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section of the act, entitled "An act to provide for an exchange of lands, with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi," approved on the 28th day of May, 1830, with full power and authority in the said Indians to divide said lands among the different tribes, nations, or bands, in severalty, with the right to sell and convey to and from each other, under such laws and regulations as may be adopted by the respective tribes, acting by themselves, or by a general council of the said New York Indians, acting for all the tribes collectively. It is understood and agreed that the above described country is intended as a future home for the following tribes, to wit: The Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and Brothertowns residing in the State of New York, and the same is to be divided equally among them, according to their respective numbers, as mentioned in a schedule hereunto annexed.

ARTICLE 3.

It is further agreed that such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may, from time to time, appoint, shall forfeit all interest in the lands so set apart, to the United States.

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ARTICLE 4.

Perpetual peace and friendship shall exist between the United States and the New York Indians; and the United States hereby guaranty to protect and defend them in the peaceable possession and enjoyment of their new homes, and hereby secure to them, in said country, the right to establish their own form of government, appoint their own officers, and administer their own laws; subject, however, to the legislation of the Congress of the United States, regulating trade and intercourse with the Indians. The lands secured to them by patent under this treaty shall never be included in any State or Territory of this Union. The said Indians shall also be entitled, in all respects, to the same political and civil rights and privileges, that are granted and secured by the United States to any of the several tribes of emigrant Indians settled in the Indian Territory.

ARTICLE 5.

The Oneidas are to have their lands in the Indian Territory, in the tract set apart for the New York Indians, adjoining the Osage tract, and that hereinafter set apart for the Senecas; and the same shall be so laid off as to secure them a sufficient quantity of timber for their use. Those tribes, whose lands are not specially designated in this treaty, are to have such as shall be set apart by the President.

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ARTICLE 6.

It is further agreed that the United States will pay to those who remove west, at their new homes, all such annuities, as shall properly belong to them. The schedules hereunto annexed shall be deemed and taken as a part of this treaty.

ARTICLE 7.

It is expressly understood and agreed, that this treaty must be approved by the President and ratified and confirmed by the Senate of the United States, before it shall be binding upon the parties to it. It is further expressly understood and agreed that the rejection, by the President and Senate, of the provisions thereof, applicable to one tribe, or distinct branch of a tribe, shall not be construed to invalidate as to others, but as to them it shall be binding, and remain in full force and effect.

ARTICLE 8.

It is stipulated and agreed that the accounts of the Commissioner, and expenses incurred by him in holding a council with the New York Indians, and concluding treaties at Green Bay and Duck Creek, in Wisconsin, and in the State of New York, in 1836, and those for the exploring party of the New York Indians, in 1837, and also the expenses of the present treaty, shall be allowed and settled according to former precedents.

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SPECIAL PROVISIONS FOR THE ST. REGIS.

ARTICLE 9.

It is agreed with the American party of the St. Regis Indians, that the United States will pay to the said tribe, on their removal west, or at such time as the President shall appoint, the sum of five thousand dollars, as a remuneration for monies laid out by the said tribe, and for services rendered by their chiefs and agents in securing the title to the Green Bay lands, and in removal to the same, the same to be aportioned out to the several claimants by the chiefs of the said party and a United States' Commissioner, as may be deemed by them equitable and just. It is further agreed, that the following reservation of land shall be made to the Rev. Eleazor Williams, of said tribe, which he claims in his own right, and in that of his wife, which he is to hold in fee simple, by patent from the President, with full power and authority to sell and dispose of the same, to wit: beginning at a point in the west bank of Fox River thirteen chains above the old milldam at the rapids of the Little Kockalin; thence north fifty-two degrees and thirty minutes west, two hundred and forty chains; thence north thirty-seven degrees and thirty minutes east, two hundred chains, thence south fifty-two degrees and thirty minutes east, two hundred and forty chains to the bank of Fox river; thence up along the bank of Fox river to the place of beginning.

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SPECIAL PROVISIONS FOR THE SENECAS.

ARTICLE 10.

It is agreed with the Senecas that they shall have for themselves and their friends, the Cayugas and Onondagas, residing among them, the easterly part of the tract set apart for the New York Indians, and to extend so far west, as to include one half-section (three hundred and twenty acres) of land for each soul of the Senecas, Cayugas and Onandagas, residing among them; and if, on removing west, they find there is not sufficient timber on this tract for their use, then the President shall add thereto timber land sufficient for their accommodation, and they agree to remove; to remove from the State of New York to their new homes within five years, and to continue to reside there. And whereas at the making of this treaty, Thomas L. Ogden and Joseph Fellows the assignees of the State of Massachusetts, have purchased of the Seneca nation of Indians, in the presence and with the approbation of the United States Commissioner, appointed by the United States to hold said treaty, or convention, all the right, title, interest, and claim of the said Seneca nation, to certain lands, by a deed of conveyance a duplicate of which is hereunto annexed; and whereas the consideration money mentioned in said deed, amounting to two hundred and two thousand dollars, belongs to the Seneca nation, and the said nation agrees that the said sum of money shall be paid to the United States, and the United States agree to receive the same, to be disposed of as follows: the sum of one hundred thousand

dollars is to be invested by the President of the United States in safe stocks, for their use, the income of which is to be paid to them at their new homes, annually, and the balance, being the sum of one hundred and two thousand dollars, is to be paid to the owners of the improvements on the lands so deeded, according to an appraisement of said improvements and a distribution and award of said sum of money among the owners of said improvements, to be made by appraisers, hereafter to be appointed by the Seneca nation, in the presence of a United States Commissioner, hereafter to be appointed, to be paid by the United States to the individuals who are entitled to the same, according to said apprisal and award, on their severally relinquishing their respective possessions to the said Ogden and Fellows.

SPECIAL PROVISIONS FOR THE CAYUGAS.

ARTICLE 11.

The United States will set apart for the Cayugas, on their removing to their new homes at the west, two thousand dollars, and will invest the same in some safe stocks, the income of which shall be paid them annually, at their new homes. The United States further agree to pay to the said nation, on their removal west, two thousand five hundred dollars, to be disposed as the chiefs shall deem just and equitable.

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SPECIAL PROVISIONS FOR THE ONONDAGAS RESIDING ON THE SENECA RESERVATIONS.

ARTICLE 12.

The United States agree to set apart for the Onondagas, residing on the Seneca reservations, two thousand five hundred dollars, on their removing west, and to invest the same in safe stocks, the income of which shall be paid to them annually at their new homes. And the United States further agree to pay to the said Onondagas, on their removal to their new homes in the west, two thousand dollars, to be disposed of as the chiefs shall deem equitable and just.

SPECIAL PROVISIONS FOR THE ONEIDAS RESIDING IN THE STATE OF NEW YORK.

ARTICLE 13.

The United States will pay the sum of four thousand dollars, to be paid to Baptista Powlis, and the chiefs of the first Christian party residing at Oneida, and the sum of two thousand dollars shall be paid to William Day, and the chiefs of the Orchard party residing there, for expenses incurred and services rendered in securing the Green Bay country, and the settlement of a portion thereof; and they hereby agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida.

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SPECIAL PROVISIONS FOR THE TUSCARORAS.

ARTICLE 14.

The Tuscarora nation agree to accept the country set apart for them in the Indian territory, and to remove there within five years, and continue to reside there. It is further agreed that the Tuscaroras shall have their lands in the Indian country, at the forks of the Neasha river, which shall be so laid off as to secure a sufficient quantity of timber for the accommodation of the nation. But if on examination they are not satisfied with this location, they are to have their lands at such place as the President of the United States shall designate. The United States will pay to the Tuscarora nation, on their settling at the West, three thousand dollars, to be disposed of as the chiefs shall deem most equitable and just. Whereas the said nation owns, in fee simple, five thousand acres of land, lying in Niagara county, in the State of New York which was conveyed to the said nation by Henry Dearborn and they wish to sell and convey the same before they remove West: Now therefore, in order to have the same done in a legal and proper way, they hereby convey the same to the United States and to be held in trust for them, and they authorize the President to sell and convey the same, and the money which shall be received for the said lands, exclusive of the improvements, the President shall invest in safe stocks for their benefit, the income from which shall be paid to the nation, at their new homes, annually; and the money which shall be received for improvements on said lands shall be paid to the owners of the

improvements when the lands are sold. The President shall cause the said lands to be surveyed, and the improvements shall be appraised by such persons as the nation shall appoint; and said lands shall also be appraised, and shall not be sold at a less price than the appraisal, without the consent of James Cusick, William Mountpleasant and William Chew, or the survivor, or survivor of them; and the expenses incurred by the United States in relation to this trust are to be deducted from the moneys received before investment.

And whereas, at the making of this treaty, Thomas L. Ogden and Joseph Fellows, the assignees of the State of Massachusetts, have purchased of the Tuscarora nation of Indians, in the presence and with the approbation of the commissioner appointed on the part of the United States to hold said treaty or convention, all the right, title, interest, and claim of the Tuscarora nation to certain lands, by a deed of conveyance, a duplicate of which is hereunto annexed: And whereas, the consideration money for said lands has been secured to the said nation to their satisfaction, by Thomas L. Ogden and Joseph Fellows; therefore the United States hereby assent to the said sale and conveyance and sanction the same.

ARTICLE 15.

The United States hereby agree that they will appropriate the sum of four hundred thousand dollars, to be applied from time to time, under the direction of the President of the United States, in such proportions,

as may be most for the interest of the said Indians, parties to this treaty, for the following purposes, to wit: To aid them in removing to their homes, and supporting themselves the first year after their removal; to encourage and assist them in education, and in being taught to cultivate their lands; in erecting mills and other necessary houses; in purchasing domestic animals, and farming utensils and acquiring a knowledge of the mechanic arts.

In testimony whereof, the commissioner and the chiefs, head men, and people, whose names are hereto annexed, being duly authorized, have hereunto set their hands, and affixed their respective seals, at the time and place above mentioned.

R. H. Gillet, Commissioner.

Senecas:
Little Johnson,
Daniel Twoguns,
Captain Pollard,
James Stevenson,
Captain Strong,
Captain Snow,
Blue Eyes,
Levi Halftown,
Billy Shanks,
White Seneca,
George Bennet,
Job Pierce,
John Gordon,

Jim Jonas,
William Johnson,
Reuben Pierce,
Morris Halftown,
Jacob Jameson,
George Big Deer,
Samuel Gordon,
Thompson S. Harris,
George Jimeson,
Nathaniel T. Strong,
Tall Peter,
Tommy Jimmy,
John Tall Chief,
George Fox,
Jabez Stevenson,
William Jones,
George White, by his agent White Seneca,
Walter Thompson, by his agent Daniel Twoguns,
Long John,
John Bark,
George Lindsay,
Jacob Bennet,
John Bennet,
Seneca White,
Maris Pierce,
David White,
James Shongo,
William Cass,
Samuel Wilson,
John Seneca.
Tuscaroras:
Nicholas Cusick,

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William Chew,
William Mt. Pleasant,
John Fox,
James Cusick,
John Patterson,
Samuel Jacobs,
James Anthony,
Peter Elm,
Daniel Peter.
Oneidas residing in the State of New York, for themselves and their parties:
Baptiste Powlis,
Jonathan Jordan.
Oneidas at Green Bay:,
John Anthony,
Honjoit Smith,
Henry Jordan,
Thomas King.
St. Regis:
Eleazer Williams, chief and agent.
Oneidas residing on the Seneca Reservation:
Silversmith, (For himself and in behalf of his nation.)
William Jacket,
Button George.
Principal Onondaga Warriors, in behalf of themselves and the Onondaga Warriors:
William John,
Noah Silversmith.
Cayugas:
King William,
James Young,
Jack Wheelbarrow,

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Joseph Isaac, For themselves and in behalf of the nation.
Principal Cayuga Warriors, in behalf of themselves and the Cayuga Warriors:
John Crow,
Snow Darkness,
Jacob G. Seneca,
Ghastly Darkness,
Thomas Crow,
Peter Wilson,
Jonathan White,
Harvey Rowe,
David Crow,
George Wheeler,
Simon Isaac,
Joseph Peter,
Jacob Jackson.

Witnesses:
James Stryker, Sub-agent, Six Nations, New York Indians.
Nathaniel T. Strong, United States' Interpreter, New York agency.
H. B. Potter.
Orlando Allen.
H. P. Wilcox.
Charles H. Allen.
Horatio Jones.
Spencer H. Cone.
W. W. Jones.
J. F. Schermerhorn.
Josiah Trowbridge.
(To the Indian names are subjoined a mark and seal.)

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SCHEDULE A.

CENSUS OF THE NEW YORK INDIANS AS TAKEN IN 1837.
Number residing on the Seneca reservations.

Senecas 2,309
Onondagas 194
Cayugas 130
2,633
Onondagas, at Onondaga 300
Tuscaroras 273
St. Regis, in New York 350
Oneidas, at Green Bay 600
Oneidas, in New York 620
Stockbridges 217
Munsees 132
Brothertowns 360

The above was made before the execution of the treaty.
R. H. Gillet, Commissioner.

SCHEDULE B.

The following is the disposition agreed to be made of the sum of three thousand dollars provided in this treaty for the Tuscaroras, by the chiefs, and assented to by the commissioner, and is to form a part of the treaty:
To Jonathan Printess, ninety-three dollars.
To William Chew, one hundred and fifteen dollars.
To John Patterson, forty-six dollars.
To William Mountpleasant, one hundred and seventy-one dollars.

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To James Cusick, one hundred and twenty-five dollars.
To David Peter, fifty dollars.
The rest and residue thereof is to be paid to the nation.

The above was agreed to before the execution of the treaty.
R. H. Gillet, Commissioner.

SCHEDULE C.

Schedule applicable to the Onondagas and Cayugas residing on the Seneca reservations. It is agreed that the following disposition shall be made of the amount set apart to be divided by the chiefs of those nations, in the preceding parts of this treaty, any thing therein to the contrary notwithstanding.

To William King, one thousand five hundred dollars.
Joseph Isaacs, seven hundred dollars.
Jack Wheelbarrow, three hundred dollars.
Silversmith, one thousand dollars.
William Jacket, five hundred dollars.
Buton George, five hundred dollars.

The above was agreed to before the treaty was finally executed.
R. H. Gillet, Commissioner.

Jan. 15, 1838.

At a treaty held under the authority of the United States

of America, at Buffalo Creek in the county of Erie, and State of New York, between the chiefs and head men of the Seneca nation of Indians, duly assembled in council, and representing and acting for the said nation, on the one part, and Thomas Ludlow Ogden of the city of New York and Joseph Fellows of Geneva, in the county of Ontario, on the other part, concerning the purchase of the right and claim of the said Indians in and to the lands within the State of New York remaining in their occupation: Ransom H. Gillet, Esquire, a commissioner appointed by the President of the United States to attend and hold the said treaty, and also Josiah Trowbridge, Esquire, the superintendent on behalf of the Commonwealth of Massachusetts, being severally present at the said treaty, the said chiefs and head men, on behalf of the Seneca nation did agree to sell and release to the said Thomas Ludlow Ogden and Joseph Fellows, and they the said Thomas Ludlow Ogden and Joseph Fellows did agree to purchase all the right, title and claim of the said Seneca nation of, in and to the several tracts, pieces, or parcels of land mentioned, and described in the instrument of writing next hereinafter set forth, and at the price or sum therein specified, as the consideration, or purchase money for such sale and release; which instrument being read and explained to the said parties and mutually agreed to, was signed and sealed by the said contracting parties, and is in the words following:

This indenture, made this fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, between the chiefs and head men of the

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Seneca nation of Indians, duly assembled in council, and acting for and on behalf of the said Seneca nation, of the first part, and Thomas Ludlow Ogden, of the city of New York, and Joseph Fellows of Geneva, in the county of Ontario, of the second part witnesseth: That the said chiefs and head men of the Seneca nation of Indians, in consideration of the sum of two hundred and two thousand dollars to them in hand paid by the said Thomas Ludlow Ogden and Joseph Fellows, the receipt whereof is hereby acknowledged, have granted, bargained, sold, released and confirmed, and by these presents do grant, bargain, sell, release and confirm unto the said Thomas Ludlow Ogden and Joseph Fellows, and to their heirs and assigns, all that certain tract, or parcel of land situate, lying and being in the county of Erie and State of New York commonly called and known by the name of Buffalo Creek reservation, containing, by estimation forty-nine thousand nine hundred and twenty acres be the contents thereof more or less. Also, all that certain other tract, or parcel of land, situate, lying and being in the counties of Erie, Chatauque, and Cattaraugus in said State commonly called and known by the name of Cattaraugus reservation, containing by estimation twenty-one thousand six hundred and eighty acres, be the contents thereof more or less. Also, all that certain other tract, or parcel of land, situate, lying and being in the said county of Cattaraugus, in said State, commonly called and known by the name of the Allegany reservation, containing by estimation thirty thousand four hundred and sixty-nine acres, be the contents more or less. And also, all that certain other tract or parcel of land, situate, lying and being partly in said county of

Erie and partly in the county of Genesee, in said State, commonly called and known by the name of the Tonawando reservation, and containing by estimation twelve thousand, eight hundred acres, be the same more or less; as the said several tracts of land have been heretofore reserved and are held and occupied by the said Seneca nation of Indians, or by individuals thereof, together with all and singular the rights, privileges, hereditaments and appurtenances to each and every of the said tracts or parcels of land belonging or appertaining; and all the estate, right, title, interest, claim, and demand of the said party of the first part, and of the said Seneca nation of Indians, of, in, and to the same, and to each and every part and parcel thereof: to have and to hold all and singular the above described and released premises unto the said Thomas Ludlow Ogden and Joseph Fellows, their heirs and assigns, to their proper use and behoof forever, as joint tenants, and not as tenants in common.

In witness whereof, the parties to these presents have hereunto and to three other instruments of the same tenor and date one to remain with the United States, one to remain with the State of Massachusetts, one to remain with the Seneca nation of Indians, and one to remain with the said Thomas Ludlow Ogden and Joseph Fellows, interchangeably set their hands and seals the day and year first above written.

Little Johnson,
Daniel Two Guns,
Captain Pollard,

James Stevenson,
Captain Strong,
Captain Snow,
Blue Eyes,
Levi Halftown,
Billy Shanks,
White Seneca,
George Bennet,
John Pierce,
John Gordon,
Jim Jonas,
William Johnson,
Reuben Pierce,
Morris Halftown,
Jacob Jimeson,
Samuel Gordon,
Thompson S. Harris,
George Jemison,
Nathaniel T. Strong,
Tall Peter,
Tommy Jimmy,
John Tall Chief,
George Fox,
Jabez Stevenson,
William Jones.

I have attended a treaty of the Seneca Nation of Indians, held at Buffalo Creek, in the county of Erie, in the State of New York, on the fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, when the within instrument was duly executed, in my presence, by the chiefs of the Seneca Nation, being

fairly and properly understood by them. I do, therefore, certify and approve the same.

R. H. Gillet, Commissioner.

Jan. 15, 1838.

At a treaty held under and by the authority of the United States of America, at Buffalo Creek, in the county of Erie, and State of New York, between the sachems, chiefs and warriors of the Tuscarora nation of Indians, duly assembled in council and representing and acting for the said nation, on the one part and Thomas Ludlow Ogden of the city of New York and Joseph Fellows of Geneva in the county of Ontario, on the other part, concerning the purchase of the right and claim of the said nation of Indians in and to the lands within the State of New York, remaining in their occupation: Ransom H. Gillet, Esquire, a commissioner appointed by the President of the United States to attend and hold the said treaty, and also Josiah Trowbridge, Esquire, the superintendent on behalf of the Commonwealth of Massachusetts, being severally present at the said treaty, the said sachems, chiefs and warriors, on behalf of the said Tuscarora nation, did agree to sell and release to the said Thomas Ludlow Ogden and Joseph Fellows, and they, the said Thomas Ludlow Ogden and Joseph Fellows did agree to purchase all the right, title and claim of the said Tuscarora nation of, in and to the tract, piece, or parcel of land mentioned and described in the instrument of writing next hereinafter set forth, and at the price, or sum therein specified, as the

consideration or purchase money for such sale and release; which instrument being read and explained to the said parties, and mutually agreed to, was signed and sealed by the said contracting parties, and is in the words following:

This indenture, made this fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, between the sachems, chiefs, and warriors of the Tuscarora nation of Indians, duly assembled in council, and acting for and on behalf of the said Tuscarora nation of the first part, and Thomas Ludlow Ogden of the city of New York, and Joseph Fellows of Geneva, in the county of Ontario, of the second part witnesseth: That the said sachems, chiefs and warriors of the Tuscarora nation, in consideration of the sum of nine thousand six hundred dollars, to them in hand paid by the said Thomas Ludlow Ogden and Joseph Fellows, the receipt whereof is hereby acknowledged, have granted, bargained, sold, released, and confirmed, and by these presents do grant, bargain, sell, release and confirm to the said Thomas Ludlow Ogden and Joseph Fellows, and to their heirs and assigns, all that tract or parcel of land situate, lying and being in the county of Niagara and State of New York, commonly called and known by the name of the Tuscarora reservation or Seneca grant, containing nineteen hundred and twenty acres, be the same more, or less, being the lands in their occupancy, and not included in the land conveyed to them by Henry Dearborn, together with all and singular the rights, the rights, privileges, heraditaments, and appurtenances to the said tract or parcel of land

belonging, or appertaining, and all the estate, right, title, interest, claim and demand of the said party of the first part, and of the said Tuscarora nation of Indians of, in and to the same, and to every part and parcel thereof: To have and to hold all and singular the above described and released premises unto the said Thomas Ludlow Ogden and Joseph Fellows, and their heirs and assigns, to their proper use and behoof forever, as joint tenants and not as tenants in common.

In witness whereof, the parties to these presents have hereunto and to three other instruments of the same tenor and date, one to remain with the United States, one to remain with the State of Massachusetts, one to remain with the Tuscarora nation of Indians and one to remain with the said Thomas Ludlow Ogden and Joseph Fellows, interchangeably set their hands and seals, the day and year first above written.

Nicholas Cusick,
William Chew,
William Mountpleasant,
John Fox,
James Cusick,
John Patterson,
Samuel Jacobs,
James Anthony,
Peter Elm,
Daniel Peter.

Sealed and delivered in presence of—

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James Stryker.
R. H. Gillet.
Charles H. Allen.
J. F. Schermerhorn.
Nathaniel T. Strong, U. S. interpreter.
H. B. Potter.
Orlando Allen.
(To the Indian names are subjoined a mark and seal.)

At the abovementioned treaty, held in my presence, as superintendent on the part of the Commonwealth of Massachusetts, and this day concluded, the foregoing instrument was agreed to by the contracting parties therein named, and was in my presence executed by them; and being approved by me, I do hereby certify and declare such my approbation thereof.

Witness my hand and seal, at Buffalo Creek, this 15th day of January, in the year 1838.

J. Trowbridge, Superintendent.

I have attended a treaty of the Tuscarora nation of Indians, held at Buffalo Creek, in the county of Erie in the State of New York, on the fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, when the within instrument was duly executed in my presence, by the sachems, chiefs, and warriors of the said nation, being fairly and properly understood and transacted by all the parties of Indians concerned and declared to be done to their full satisfaction. I do therefore certify and approve the same.

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R. H. Gillet, Commissioner.
Feb. 13, 1838.

7 Stat., 561.

Supplemented article to the treaty concluded at Buffalo Creek, in the State of New York, on the 15th of January 1838, concluded between Ransom H. Gillet, commissioner on the part of the United States, and chiefs and head men of the St. Regis Indians, concluded on the 13th day of February 1838.

Supplemental article to the treaty concluded at Buffalo Creek in the State of New York, dated January 15, 1838.

The undersigned chiefs and head men of the St. Regis Indians residing in the State of New York having heard a copy of said treaty read by Ransom H. Gillet, the commissioner who concluded that treaty on that part of the United States, and he having fully and publicly explained the same, and believing the provisions of the said treaty to be very liberal on the part of the United States and calculated to be highly beneficial to the New York Indians, including the St. Regis, who are embraced in its provisions do hereby assent to every part of the said treaty and approve the same. And it is further agreed, that any of the St. Regis Indians who wish to do so, shall be at liberty to remove to the said country at any time hereafter within the time specified in this treaty, but under it the Government shall not compel them to remove. The United States will, within one year after the ratification of this treaty, pay over to the American party of said Indians one thousand dollars,

part of the sum of five thousand dollars mentioned in the special provisions for the St. Regis Indians, any thing in the article contained to the contrary notwithstanding.

Done at the council house at St. Regis, this thirteenth day of February in the year of our Lord one thousand eight hundred and thirty-eight. Witness our hands and seals.

R. H. Gillet, Commissioner.
Lover-taie-enve,
Louis-taio-rorio-te,
Michael Gaveault,
Lose-sori-sosane,
Louis-tioonsate,
Jok-ta-nen-shi-sa,
Ermoise-gana-saien-to,
Tomos-tataste,
Tier-te-gonotas-en,
Tier-sokoia-ni-saks,
Sa-satis-otsi-tsia-ta-gen,
Tier-sgane-kor-hapse-e,
Ennios-anas-ota-ka,
Louis-te-ganota-to-ro,
Wise-atia-taronne,
Tomas-outa-gosa,
Sose-te-gaomsshke,
Louis-orisake-wha,
Sosatis-atis-tsiaks,
Tier-anasaken-rat,
Louis-tar-oria-keshon,
Jasen-karato-on.

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The foregoing was executed in our presence—

A. K. Williams, Agent on the part of New York for St. Regis Indians.
W. L. Gray, Interpreter.
Owen C. Donnelly.
Say Saree.
(To the Indian names are subjoined a mark and seal.)

We the undersigned chiefs of the Seneca tribe of New York Indians, residing in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, and to our contract therewith, the same having been submitted to us by Ransom H. Gillet, a Commissioner on the part of the United States, and fully and fairly explained by him, to our said tribe, in council assembled.

Dated Buffalo Creek September 28, 1838.

Captain Pollard,
Captain Strong,
White Seneca,
Blue Eyes,
George Bennett,
Job Pierce,
Tommy Jimmy,
William Johnson,
Reuben Pierce,
Morris Halftown,

Levi Halftown,
George Big Deer,
Jim Jonas,
George Jimeson,
Thomas Jimeson,
George Fox,
N. T. Strong,
Thompson S. Harris,
Samuel Gordon,
Jacob Jimeson,
John Gordon,
Tall Peter,
Billy Shanks,
James Stevenson,
Walter Thompson,
John Bennett,
John Seneca,
John General,
Major Jack Berry,
John Tall Chief,
Jabez Stevenson.
(To the Indian names are subjoined marks.)

The above signatures were freely and voluntarily given after the treaty and amendments had been fully and fairly explained in open council.

R. H. Gillet, Commissioner.

Witness:
H. A. S. Dearborn, Superintendent of Massachusetts.
James Stryker, U. S. Agent.

Appendix X

Little Johnson,
Samuel Wilson,
John Buck,
William Cass,
Long John,
Sky Carrier,
Charles Greybeard,
John Hutchinson,
Charles F. Pierce,
John Snow.
(To the Indian names are subjoined marks.)

These ten chiefs signed in my presence except the last John Snow.

H. A. S. Dearborn,
Superintendent of Massachusetts.

Signed in presence of –
Nathl. T. Strong, U. S. Interpreter.
James Stryker, U. S. Agent.
George Kenququide, by his attorneys.
N. T. Strong.
White Seneca.

The signature of George Kenququide was added by his attorneys in our presence.

R. H. Gillet,
James Stryker.

18th January 1839.

Appendix X

We the undersigned chiefs of the Oneida tribe of New York Indians do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States and fully and fairly explained by him to our said tribe in council assembled.

Dated August 9th, 1838 at the Oneida Council House.

Executed in the presence of—
Timothy Jenkins.

First Christian Party:
Baptista Powlis,
Anthony Big Knife,
Peter Williams,
Jacob Powlis,
Anthony Anthony,
Peter Martin,
Cornelius Summer,
Isaac Wheelock,
Thomas Doxtater,
William Hill,
Baptiste Denny.
Orchard Party:
Jonathan Jordon,
Thomas Scanado,
Henry Jordon,
William Day.
Second Christian Party:
Abraham Denny,

Appendix X

Adam Thompson,
Peter Elm,
Lewis Denny,
Martin Denny.
(To the Indian names are subjoined marks.)

The above assent was voluntarily freely and fairly given in my presence, after being fully and fairly explained by me.

R. H. Gillet, Commissioner, &c.

We the undersigned sachems, chiefs and head men of the Tuscarora nation of Indians residing in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, and to our contract connected therewith, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States, and fully and fairly explained by him to our said tribe in council assembled.

Dated August 14th, 1838.

Nicholas Cusick,
William Chew,
William Mountpleasant,
John Patterson,
Matthew Jack,
George L. Printup,
James Cusick,

Appendix X

Jonathan Printup,
Mark Jack,
Samuel Jacobs.

Executed in presence of—
J. S. Buckingham,
D. Judson,
Leceister S. Buckingham,
Orlando Allen.
(To the Indian names are subjoined marks.)

The above assent was freely and voluntarily given after being fully and fairly explained by me.

R. H. Gillet, Commissioner.

We the undersigned chiefs and head men of the tribe of Cayuga Indians residing in the State of New York do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States, and fully and fairly explained by him to our said tribe in council assembled.

Dated August 30th, 1838.

Thomas Crow,
John Crow,
Ghastly Darkness,
Jacob G. Seneca.

Appendix X

Executed in presence of—
James Young.
(To the Indian names are subjoined marks.)

The above four signatures were freely given in our presence.

R H. Gillet, Commissioner.
H. A. S. Dearborn,
Superintendent of Massachusetts.

We the undersigned sachems, chiefs and head men of the American party of the St. Regis Indians residing in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the Senate of the United States on the eleventh day of June 1838, the same having been submitted to us by Ransom H. Gillet a commissioner on the part of the United States, and fully and fairly explained by him to our said tribe in council assembled. The St. Regis Indians shall not be compelled to remove under the treaty or amendments.

Dated October 9th, 1838.

Lorenn-taie-enne,
Sase-sori-hogane,
Louis-taw-roniate,
Thomas-talsete,
Saro-sako-ha-gi-tha,
Louis-te-ka-nota-tiron,
Michael Gareault,

Appendix X

W. L. Gray, Int.
Louis-tio-on-sate,
Tier-ana-sa-ker-rat,
Tomas-ska-en-to-gane,
Tier-sa-ko-eni-saks,
Saro-tsio-her-is-en,
Sak-tho-te-ras-en,
Saro-saion-gese,
Louis-onia-rak-ete,
Louis-aion-gahes,
Sak-tha-nen-ris-hon,
Sa-ga-tis-ania-ta-ri-co,
Louis-sa-ka-na-tie,
Sa-ga-tis-asi-kgar-a-tha,
Simon-sa-he-rese,
Resis-tsis-kako,
Ennias-kar-igiio,
Sak-tsior-ak-gisen,
Tier-kaien-take-ron,
Kor-ari-hata-ko,
Tomas-te-gaki-gasen,
Saro-thar-on-ka-tha,
Ennias-anas-ota-ko,
Wishe-te-ka-nia-tasoken,
Tomas-tio-nata-kgente,
wishe-aten-en-rahes,
Tomas-ioha-hiio,
Ennias-kana-gaien-ton,
Louis-taro-nia-ke-thon,
Louis-ari-ga-ke-wha,
Sak-tsio-ri-te-ha,
Louis-te-ga-ti-rhon,
Tier-atsi-non-gis-aks.

The foregoing assent was signed in our presence.

R. H. Gillet, Commissioner.

Witnesses:
James B. Spencer.
Heman W. Tucker.
A. K. Williams, Agent St. Regis Indians.
Frs. Marcoux Dictre.
(To the Indian names are subjoined marks.)

We the undersigned, chiefs, head men and warriors of the Onondaga tribe of Indians residing on the Seneca reservations in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the Senate of the United States on the eleventh day of June, 1838, the same having been submitted to us, by Ransom H. Gillet, a commissioner on the part of the United States and fully and fairly explained by him to our said tribe in council assembled.

Dated August 31st, 1838.

Silversmith,
Noah Silversmith,
William Jacket.

(To the Indian names are subjoined marks.)

The above signatures were freely given in our presence.

R. H. Gillet, Commissioner.
H. A. S. Dearborn,
Superintendent of Massachusetts.

APPENDIX Y — EXCERPTS OF RECORD OF DECISION IN THE ONEIDA INDIAN NATION OF NEW YORK FEE-TO-TRUST REQUEST

Record of Decision

Oneida Indian Nation of New York
Fee-to-Trust Request

U.S. Department of the Interior
Bureau of Indian Affairs
May 2008

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1.0 INTRODUCTION

1.1 Summary

This is the Record of Decision ("ROD") concerning the April 4, 2005 request of the Oneida Indian Nation of New York ("Nation") for the United States, through the Secretary of the Interior, to acquire title to real property in trust status for the Nation under authority of Section 5 of the Indian Reorganization Act of 1934 ("IRA"), codified at 25 U.S.C. § 465. The property is located in Madison County and Oneida County, New York, and is owned by the Nation. The Nation's land-into-trust request (an on-reservation, fee-to-trust request) includes 330 parcels, or 440 tax lots, totaling approximately 17,370 acres.

The Nation submitted its fee-to-trust request in response to the March 29, 2005 decision of the U.S. Supreme Court in City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005). In City of Sherrill, the Supreme Court ruled that the Nation could

not unilaterally assert tribal tax immunity to prevent a local government from assessing real property taxes on lands that the Nation re-acquired two centuries after they had last been possessed by the Oneidas. The Supreme Court instructed that the "proper avenue" for the Nation "to reestablish sovereign authority over" the lands is by a fee-to-trust application to the Secretary of the Interior pursuant to 25 U.S.C. § 465 and the Department's implementing regulations at 25 C.F.R. Part 151. City of Sherrill, 544 U.S. at 221.

* * *

With the issuance of this ROD, the Department announces its intent to acquire approximately 13,003.89 acres in trust status for the Nation.

* * *

1.2 Description of the Proposed Action

Under the Proposed Action, the Secretary would accept into trust approximately 17,370 acres located within the Oneida reservation as confirmed by the 1794 Treaty of Canandaigua. 7 Stat. 44. The lands proposed for conveyance comprise approximately 1.5% and 1.3% of the total acreage of Madison County and Oneida County, respectively.

The Nation intends to continue the existing uses of the lands and proposes no change in land use or ground-disturbing activity as part of the Proposed Action.

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1.3 Purpose and Need for Action

The purpose of the Proposed Action is to help address the Nation's need for cultural and social preservation and expression, political self-determination, self-sufficiency, and economic growth by providing a tribal land base and homeland that:

- is subject to tribal sovereignty;
- allows for a diversified and productive economic base to support the Nation's financial integrity and the employment and financial well-being of its members;
- provides for the location of tribal government and administrative buildings, housing for Nation members, health and educational facilities, burial grounds, and lands for agricultural, hunting, fishing, recreational, cultural, and social activities;
- protects the Oneida historic and cultural sites under Oneida sovereignty and control;
- assures the preservation of a homeland for those Nation members located elsewhere in New York State and throughout the United States;
- is restricted against future alienation and is immune from New York State and local taxation and regulation unless otherwise provided under Federal law;

- enables application of Federal laws that pertain to lands held in trust; and

- permits further growth and consolidation of Nation lands.

* * *

2.1.1 Negotiated Settlement Alternative

Commenters proposed that the Department not act on the Nation's fee-to-trust request unless and until an agreement regarding placement of lands into trust and related issues is reached. This alternative was eliminated from further consideration because achieving a negotiated resolution is not reasonably foreseeable. The Nation and the State and local governments were free to reach and submit an agreement to the Department for its consideration prior to the issuance of this ROD, but have not done so. Moreover, the issuance of this ROD does not prevent them from doing so prior to formal acceptance of the Subject Lands into trust.

2.1.2 Resolution of Land Claim Alternative

Commenters proposed that the Department not act on the Nation's fee-to-trust request unless and until the Nation's land claim and related issues are resolved. Deferral of a decision on the Nation's April 4, 2005 request until the land claim is resolved is not reasonable.

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The acquisition of land in trust status for Indian tribes under authority of Section 5 of the IRA is separate from tribal land claims based on Federal common law and/or the Non-Intercourse Act, 25 U.S.C. § 177. For example, a tribe may still maintain a money damages claim based on a possessory right and/or an unjust enrichment claim after the land at issue has been re-acquired by the tribe and placed into trust. Such relief would, in the Department's view, also still be available to any other tribal claimants to the same land. Thus, the pending land claims of other Indian tribes to some or all of the lands claimed and owned by the Nation, including the claims of the Oneida Tribe of Indians of Wisconsin and the Stockbridge-Munsee Community Band of Mohican Indians, do not disqualify the Subject Lands from being acquired in trust for the Nation.

Where trust land acquisitions and land claims may become intertwined is when land is taken into trust in settlement of a land claim. In that case, trust land acquisitions may substitute in part or in whole for the judicial relief that the tribal claimant seeks. The Nation's land claim has been pending in the courts since 1970 and mediations have been terminated by courts as futile, most recently in 2005. Reaching a land claim settlement that also addresses the trust land issue is less likely than resolving the trust land issue by agreement alone.

On February 16, 2002, the Governor of New York announced that the State, the Nation, Madison County, and Oneida County had agreed on the framework of a land claim settlement that included 35,000 acres of land

to be held and governed by the Nation. In consideration of this prior land claim settlement framework, Alternative B was developed to provide an analysis of the potential impacts of acquiring 35,000 acres in trust status in the event that land claim settlement discussions are revived.

2.1.3 Legislative Solution Alternative

Commenters proposed that the Department not act on the Nation's fee-to-trust request unless and until Federal legislation is enacted to address it. No such legislation has been enacted, and the prospect for agreement among the governments and implementing legislation is speculative.

2.1.4 Land Conveyance in Fee Status Alternative

Commenters proposed that the United States acquire fee title to some or all of the lands and make them subject to State and local taxation and regulation. There is no statutory authority for the Secretary to acquire title to lands in fee status for Indians and to subject the lands to State and local taxation and regulation. This alternative conflicts with Section 5 of the IRA, which expressly provides that title to lands acquired for Indians shall be held by the United States in trust status and that the lands shall be exempt from State and local taxation. Moreover, this alternative appears to contemplate that the State and local governments could enforce taxes on Federal fee lands through foreclosure. Such a situation is precluded by the Federal government's sovereign immunity.

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2.1.5 Creation of a New York State Reservation or Trust Alternative

Commenters proposed that the lands be placed in a reservation to be created by New York State or be acquired in trust by the State and governed by State law. Basic features of Federal trust status include restriction of the land against alienation (including by the state and local governments), immunization of the land against state and local taxation, and the exercise of tribal sovereignty and jurisdiction over the land to the exclusion of the state and local governments (except as otherwise provided under Federal law). A New York State-created reservation or a State-created trust would be only as protective as the State would allow and it would not prevent future encroachment by the State or local governments in the areas of alienation, taxation, or regulation. Although the State could enact legislation conferring immunity from real property taxation, which the Nation contends the State has already done, see. e.g., New York Indian Law § 6 (2008) ("No taxes shall be assessed, for any purpose whatever, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe, or band occupying the same"), the State and local governments oppose removal of the Nation's lands from the tax rolls. In addition, this alternative would apparently entail disestablishment of the existing Federal reservation, contrary to the fact that "only Congress can divest a reservation of its land and diminish its boundaries." City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197, 215 n.9 (2005) (quoting Solem v. Bartlett, 465 U.S. 463, 470 (1984)).

Appendix Y

On February 13, 2007, legislation was introduced in the New York State Assembly to establish an "Oneida Indian Nation Turning Stone State Reservation" in recognition of the "significant economic benefits" that the Turning Stone Casino provides "to the local population, such that it is not in the best interest of New York State to order 'Turning Stone' to cease its gaming operation ...." 2007 NY A.B. 5270. New York State legislation is neither necessary nor sufficient to authorize Class III gaming at Turning Stone. Turning Stone is now operating lawfully under IGRA. In addition, the United States does not recognize land held in trust by a state or a state-created reservation as an Indian reservation under Federal law. Consequently, state legislation alone would not authorize gaming under IGRA. For these reasons and the reasons stated above, this alternative does not meet the purpose and need for action.

* * *

3.0 ISSUES EVALUATED

3.1 Issues Raised During Scoping and During Public Review of the Draft EIS

A number of issues were raised during the scoping process and during public review of the Draft EIS. Each of the alternatives considered in the Final EIS were evaluated relative to these and other issues. The Nation is proposing no physical resource-impacting projects or changes in land use as part of the Proposed Action. Ongoing enhancements to the Turning Stone Resort &

Casino are occurring independently of the Department's action on the fee-to-trust request. As a result, the most substantive issues did not relate to physical environmental impacts and instead related to the following:

- Jurisdictional and land use regulation impacts
- Socioeconomic impacts
- Historic, cultural, and archaeological resource protection impacts
- Cumulative impacts

In these areas, unavoidable adverse impacts could occur under certain alternatives in one or more of the taxation/jurisdiction scenarios previously described. Unavoidable adverse impacts associated with the Preferred Alternative (Alternative I) are expected to be minor and/or localized.

* * *

3.1.2 Socioeconomic Impacts

The potential fiscal impacts of acquiring land in trust are evaluated in the context of 25 C.F.R. Part 151. See 25 C.P.R. § 151.10(e) (requiring consideration of "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls"); City of Sherrill, 544 U.S. at 221. The Department's evaluation pursuant to 25 C.F.R. §

151.10(e) of the impact on New York State and its political subdivisions resulting from the removal of the Nation's lands from the tax rolls is contained in Section 7.5 of this ROD, infra. Under NEPA, economic or social effects of a proposed action "are not intended by themselves to require preparation of an environmental impact statement." 40 C.F.R. § 1508.14.

Although not required under NEPA, as a matter of discretion and to more comprehensively evaluate and respond to the concerns of the State and local governments and other commenters in this particular case, the Department prepared a Final EIS containing a thorough analysis of the socioeconomic issues that were raised in connection with the Proposed Action and other alternatives. This analysis includes, among other things, the potential loss of real property tax revenues resulting from acquisition of the Nation's lands in trust; costs to the State and local governments for rendering services that are attributable to the Nation; and the economic benefits to the State and local governments provided directly and indirectly by the Nation (e.g., payments under municipal service agreements, contributions to infrastructure, employee tax payments, etc.). See Final EIS §§ 3.7, 4.7, 5.2, and App. E.

In general, the Nation has not paid taxes on its lands since re-acquiring them beginning in 1987 under the assumption that it had could assert tribal tax immunity over those lands. After the Supreme Court's 2005 ruling in City of Sherrill that the Nation cannot unilaterally assert tribal tax immunity as a matter of Federal law,

disputes persist over whether the Nation owes taxes as a matter of State law.[3] The Nation has, however, recognized that it uses State and local government services, and has therefore made voluntary payments through service agreements to defray the costs of such services. These payments, in combination with other direct and indirect contributions that the Nation has made to the State and local governments, more than offset the alleged annual loss of revenue resulting from the Nation's non-payment of real property taxes. Under agreements reached with the Cities of Sherrill and Oneida after the City of Sherrill decision, the Nation makes payments to cover the full amounts of the taxes levied by the Cities.

3.1.2.1 Analysis of Socioeconomic Impacts

The Final EIS analyzed the baseline 2005 economic conditions by comparing the Nation's use of State and local government services to its positive economic contributions. In 2005, the revenues provided directly and indirectly by the Nation to the State and local governments (including agreements and employee and multiplier taxes) totaled approximately $24.29 million. The Nation's costs to New York State and local governments for services attributed to the Nation

[3] As discussed in Section 7.5.4 of this ROD, infra, the Department has determined that the taxes, penalties, and interest that have been assessed on the Turning Stone Casino tax lot are, in major part, unlawful. The taxes and related charges on this 225-acre tax lot comprise most of the taxes and related charges that are allegedly owed by the Nation.

totaled approximately $7.54 million. Thus, the Nation provided a net positive contribution of $16.76 million to the New York State and local governments.

The Final EIS also analyzed the baseline 2005 economic conditions by subtracting (a) the uncollected property taxes combined with the costs of services attributable to the Nation and not usually paid for with property tax revenues from (b) the Nation's direct and indirect contributions. Depending on the taxable value of the Turning Stone Casino tax lot, the Nation provided a net contribution of between $4.76 million (including the casino tax lot as assessed by the Town of Verona) and $15.90 million (excluding the casino tax lot). Thus, when the Nation did not pay taxes in the past it more than offset the total lost tax revenue, if taxes are in fact due and owing.

Further, the Final EIS analyzed economic conditions in the year 2011 under each of the alternatives. Although the placement of lands into trust permanently removes the lands from the tax rolls, the Nation's ongoing direct and indirect contributions would more than offset the loss of real property tax revenues under any of the alternatives in which Nation-owned lands would be acquired in trust. This effect is summarized in Tables 4.7-42 to 4.7-44 and 5.2-1 of the Final EIS. Even assuming, arguendo, that taxes on the Nation's lands are now due and owing, for the various trust acquisition alternatives (Alternatives A through F, H, and I), the net positive contributions range from approximately $1.9 million to over $17 million annually, depending on the taxable value of the Turning Stone Casino tax lot.

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The Proposed Action (Alternative A) would result in a net contribution to the State and local governments of between $4.76 million and $16.96 million after property tax loss. The Preferred Alternative (Alternative I) would result in a net contribution of between $4.46 million and $16.66 million after property tax loss. The County-Proposed Alternative (Alternative H) would result in a net contribution of between $4.34 million and $16.54 million after property tax loss. Thus, the net contribution under the Proposed Action would be higher than the Preferred Alternative, which in turn would be higher than the County-Proposed Alternative. This would result from reductions in Nation direct and indirect contributions under Alternatives H and I, which would occur if the lands not acquired in trust under these alternatives are alienated and the Nation enterprises situated on them cease to operate (PTNP-F taxation/jurisdiction scenario).

Under the No Action Alternative (Alternative G), in contrast, the net effect would be a positive contribution of $360,000 irrespective of the taxable value of the casino tax lot. (As represented in Table 5.2-1, a significant net loss would result if it is assumed that the casino tax lot is taxable to the degree the lot is being assessed by the Town of Verona and that the taxes would be collected but for closure of the casino under the CC-AEC scenario. As previously discussed, that scenario would occur only if the State prevailed in its stance regarding the lawfulness of the casino.)

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With respect to employment as a component of socioeconomics, in comparison to the Proposed Action (Alternative A) and Alternative B, a reduction in jobs would occur in certain taxation/jurisdiction scenarios under all other alternatives. This is summarized in Table 4.7-4 of the Final EIS. Under Alternative H, in the PTNP-F scenario, a short-term loss of 491 Nation- and non-Nation jobs would occur. Under Alternative I, in the PTNP-F scenario, a short-term loss of 234 Nation- and non-Nation jobs would occur. Under the No Action Alternative (Alternative G), in the PTNP-F scenario or the CC-AEC scenario (which scenario the Department disputes), a loss of 5,265 Nation- and non-Nation jobs would occur. The region generally has been in economic decline, with several major regional employers ceasing operations in the recent past. See Final EIS at 4-150 to 4-153. The historical regional economic decline indicates that the region could not readily absorb the loss of 5,000 jobs and the over $100 million payroll that those jobs provide.

Due to future job growth associated with the Turning Stone Resort & Casino, the short-term job loss discussed above would be offset in part or whole by the year 2011. Under Alternative H, the net job loss by the year 2011 would be 234 jobs. Under Alternative I, future growth would exceed short-term job loss by the year 2011, resulting in a net gain of 56 jobs. Under Alternative A, in which no short-term job loss would occur, future growth would add 313 jobs by the year 2011.

Under Alternatives A, B, C, F, and I, the Nation's demand for healthcare, emergency medical service, fire protection, and other community-supplied services would increase with incremental growth in the community and with added visitation of the Turning Stone Resort & Casino. This would represent an unavoidable adverse effect on the resources of the local governments. The anticipated growth, however, would not likely increase the demand such that it would result in the creation of new facilities or in physical alterations to existing facilities. The increased demand also would not likely affect current response times for emergency services. Thus, the effect on community services is expected to be less than significant under these alternatives.

In the PTP and PTNP-DC scenarios under Alternatives A through F, H, and I, the Nation's service agreements related to the provision of community services would be maintained to varying degrees depending on the particular alternative. However, in the CC-AEC scenario of the No Action Alternative (which scenario the Department disputes) and in the PTNP-F scenario under Alternatives C through I, the service agreements would be significantly reduced in scope or terminated. In addition, under Alternatives D, E, and G, the Nation's own government programs and services would cease to operate in their current form and would be forced to rely heavily on Federal funding, if they could continue at all. Some of the Nation's government programs and services may be curtailed in Alternatives H and I. The reduction in Nation-provided services could lead to greater burdens on municipal budgets.

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A number of comments suggested that placement of lands into trust for the Nation would create a competitive business advantage for the Nation and would decrease the marketability of non-Nation lands. Specifically, State and local governments contended that the beginnings of a "monopolistic or 'big operator' business environment" is evident in an alleged predominance of Nation-owned gas stations and convenience stores in the area in general and marine gasoline sales at Oneida Lake in particular. These comments suggested that the Nation should therefore be required to pay its "fair share" of taxes.[4]

The State's policy of not enforcing sales and excise taxes on Indian-owned stores supports the Nation's economic competitiveness. See, e.g., Final EIS at 3-276 to 3-279, 3-386 to 3-389. Placement of the lands into trust would not prevent the State from enforcing lawfully applicable sales and excise taxes if in the future it determines to do so. In addition, the Nation has generally not paid real property taxes to date, and Federal district court decisions subsequent to City of Sherrill have ruled that taxes cannot be assessed on the Nation's lands under State law. See Oneida Indian Nation of New York v.

[4] Consideration of any economic impact that may result from placing land into trust is not required by NEPA, Section 5 of the IRA, or 25 C.F.R. Part 151. See Santa Ynez Valley Concerned Citizens v. Pacific Regional Director, 42 IBIA 189, 202-05 (2006), aff'd after limited reopening, Preservation of Los Olivos v. Pacific Regional Director, 45 IBIA 98 (2007), appeal pending, Preservation of Los Olivos v. Department of the Interior, No. CV-06-1502 AHM (C.D. Cal.). The Department analyzed these issues in its discretion in this particular case.

Madison County, 401 F. Supp. 2d 219 (N.D.N.Y. 2005), motion to alter, amend or obtain relief from the judgment denied, 235 F.R.D. 559 (2006); Oneida Indian Nation of New York v. Oneida County, 432 F. Supp. 2d 285 (N.D.N.Y. 2006). Thus, the placement of lands into trust would have the practical effect of continuing the status quo with regard to real property tax collections.

Moreover, for the most part, Nation enterprises conducted on the Preferred Alternative (Alternative I) lands do not compete with other local businesses. The Preferred Alternative, through its focus on the Casino-Resort and Government-Cultural groupings, results in the omission of nine out of the 13 Nation-owned gas stations and convenience stores and all three Nation-owned marinas at Oneida Lake. Also, in this region where dairy cattle operations are predominant, the Nation has established a Black Angus beef cattle operation and it provides dairy cattle boarding and feeding services to local farmers at its "Heifer Hotel," thereby complementing the local farming industry.

In contrast, in the PTNP-F scenario under Alternatives C through I, or in the CC-AEC scenario under Alternative G (which scenario the Department disputes), large amounts of Nation-owned lands would enter the real estate market, ranging from 17,370 acres under the No Action Alternative to 4,284 acres under the Preferred Alternative. The influx of these properties into the market, in combination with the closure of associated Nation enterprises on which the community depends for jobs and revenues, could result in significant

adverse impacts to the community. The potential for such impacts would be minimized under the Preferred Alternative While also meeting the purpose and need for action, and promoting contiguity and compactness among the trust lands.

* * *

7.0 DECISION TO ACQUIRE 13,003.89 ACRES IN TRUST

The procedures and policies concerning the Secretary's exercise of discretion for acquiring lands in trust for Indian tribes and individuals are set forth in 25 U.S.C. § 465 and 25 C.F.R. Part 151. The Department's evaluation of the Nation's fee-to-trust request based on the applicable criteria is provided in Sections 7.1 through 7.9 of this ROD, below.

7.1 25 C.F.R. § 151.3 - Land Acquisition Policy

The Nation's fee-to-trust request meets the two threshold requirements of the Secretary's land acquisition policy in 25 C.F.R. § 151.3. First, land may be acquired in trust status for an Indian tribe or individual. A "tribe" includes any Indian tribe or nation "which is recognized by the Secretary as eligible to receive the special programs and services from the Bureau of Indian Affairs." 25 C.F.R. § 151.2(b). The Nation is a Federally recognized Indian tribe and is eligible to receive services from the BIA. See Department of the Interior, Indian Entities Recognized and Eligible to Receive Services from the United States

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Bureau of Indian Affairs, 72 Fed. Reg. 13648, 13650 (Mar. 22, 2007) (listing the Oneida Nation of New York as an eligible entity).

Second, land may be acquired for a tribe in trust status:

> (1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or (2) When the tribe already owns an interest in the land [i.e., the tribe owns an interest in an off-reservation asset and seeks to consolidate that interest]; or (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

25 C.F.R. § 151.3(a)(1)-(3). This requirement is satisfied under the first prong (subsection 151.3(a)(I), because the Nation's request is for acquisition of lands located within the exterior boundaries of its "Indian reservation," as defined in 25 C.F.R. § 151.2(f), or adjacent thereto. See City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197, 215 n.9 (2005) (acknowledging the Second Circuit Court of Appeals ruling that "the Oneida's reservation was not disestablished," and declining to review that issue) (citing Oneida Indian Nation of New York v. City of Sherrill, 337 F.3d 139, 167 (2d Cir. 2003)). Subsequent to the Supreme Court's decision in City of Sherrill, a Federal district court has ruled that the Oneida

reservation was not disestablished. Oneida Indian Nation of New York v. Madison County, 401 F. Supp. 2d 219 (N.D.N.Y. 2005), motion to alter, amend, or obtain relief from the judgment denied, 235 F.R.D. 559 (2006); Oneida Indian Nation of New York v. Oneida County, 432 F. Supp. 2d 285 (N.D.N.Y. 2006).

Therefore, the Nation's request was evaluated under the on-reservation acquisition criteria listed at 25 C.F.R. § 151.10. The same criteria would apply even if the Oneida reservation has been diminished or disestablished as the State and local governments contend. Where there has been a final judicial determination that a reservation has been diminished or disestablished, "Indian reservation" also includes the area of land constituting the former reservation of the tribe as defined by the Secretary. 25 C.F.R. § 151.2(f); Shawano County, Wisconsin, Board of Supervisors v. Midwest Regional Director, 40 IBIA 241, 245-46 (2005); County of Mille Lacs, Minnesota v. Midwest Regional Director, 37 IBIA 169, 172 (2002).

Certain lands now owned by the Nation and located in the Town of Stockbridge are claimed by the Stockbridge-Munsee Community Band of Mohican Indians to be within a Stockbridge reservation. The Nation contends that all of these lands are located within the Oneida reservation. This dispute does not prevent the United States, through the Secretary, from acquiring title to the Subject Lands in trust for the Nation. No court has ruled on the Stockbridge-Munsee Community's claim to a Stockbridge reservation in New York. Nor does the

Stockbridge-Munsee Community currently exercise jurisdiction over the disputed area. Therefore, it is the Department's determination that 25 C.F.R. § 151.8 does not apply to require consent of the Stockbridge-Munsee Community to acquire the disputed lands in trust for the Nation. Moreover, the Nation-owned parcels that are both (a) located within the disputed area and (b) included in the Subject Lands are all located contiguous to the undisputed (by the Stockbridge-Munsee Community) Oneida reservation. Lands that are located "within or contiguous to" the Oneida reservation are subject to the on-reservation trust acquisition criteria. See 25 C.F.R. § 151.10. The Department considered the reservation dispute in its selection of the Preferred Alternative (Alternative I) in the Final EIS. This final determination differs from the Preferred Alternative identified in the Final EIS in that the Department has removed one parcel (Parcel 136) located in the Town of Stockbridge that is not contiguous to the undisputed Oneida reservation.

Because all of the Subject Lands are located within or adjacent to the Oneida reservation, the Department need not make a determination with respect to subsection 151.3(a)(3) (acquisition is necessary to facilitate tribal self-determination, economic development, or Indian housing).[5]

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[5] The Department also notes that, even if the off-reservation criteria applied to the Nation's fee-to-trust request, the Department would still acquire the Subject Lands in trust. Under the off-reservation standards, the Department considers the distance from the tribe's reservation to the land to be

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Nonetheless, as discussed in Section 7.3 of this ROD, infra, the Department finds that acquisition of the Subject Lands in trust is necessary to facilitate tribal self-determination, economic development, and Indian housing.[5]

* * *

7.3.1.1 Tribal Membership and Economic Status

The Department considered the Nation's membership in the context of need. The Nation has approximately 1,000 enrolled members, approximately 650 of whom reside on or near the Oneida reservation. See BIA, American Indian Population and Labor Force Report at 4 (2003). The Nation is a matrilineal society where membership and clan affiliation are derived from one's mother. As a result, the membership roll of the Nation does not fully represent the number of persons who receive services and support from the Nation. The Nation provides services to its .enrolled members and

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acquired. See 25 C.F.R. § 151.11(b). As the distance increases, the Department gives greater scrutiny to the tribe's justification of anticipated benefits from the acquisition and greater weight to the concerns raised the state and local governments regarding the acquisition's potential impacts on regulatory jurisdiction, real property taxes, and special assessments. See id. As shown by extraordinary comprehensiveness of the Final EIS and this ROD, the Department has given thoughtful consideration both to the Nation's justification for placing lands into trust and to the concerns raised by New York State and local governments.

their families, and to other Indians in Central New York. In any case, while tribal membership and residence is a permissible consideration in the context of need, no mathematical formula compels a determination of how much trust land is needed. See County of Sauk, Wisconsin v. Midwest Regional Director, 45 IBIA 201.211-13 (2007).

The Department also considered the financial status of the Nation, which is detailed in the Final EIS at pages 3-276 to 3-296. Like tribal membership, no mathematical formula concerning the wealth (or lack thereot) of a tribe is determinative of its need for land in trust. See County of Sauk, 45 IBIA at 209-11 ("Indeed, it is readily imaginable that the 'need' will vary from one tribe to another or from one individual Indian to another such that flexibility in evaluating 'need' is an inevitable and necessary aspect of BIA's discretion."). Need for land depends on the circumstances of a particular Indian tribe or individual, and also relates to the purpose for which the land will be used. The Department's determination of the Nation's need for land in trust in relation to the Nation's situation is discussed below.

7.3.1.2 Determination of Necessity

As a threshold matter, the Department finds that the Nation's financial wherewithal and competence to manage its affairs do not render it ineligible for placement of land into trust. Section 5 of the IRA is not limited to landless or impoverished tribes. or to tribes that are incompetent to handle their own affairs. See United States v. 29 Acres of Land, 809 F.2d 544, 545 (8th Cir. 1987); Chase v. McMasters, 573 F.2d 1011, 1015-16

(8th Cir. 1978), cert. denied, 439 U.S. 965 (1978); City of Sault Ste. Marie v. Andrus, 532 F. Supp. 157, 162 (D.D.C. 1980); City of Tacoma v. Andrus, 457 F. Supp. 342, 345 (D.D.C. 1978); Kansas v. Acting Southern Plains Regional Director, 36 IBIA 152, 155 (2001). A tribe's casino income does not disqualify it from, and financial difficulties are not a prerequisite for, acquisition of land in trust. See County of Sauk, 45 IBIA at 209-11; South Dakota v. Acting Great Plains Regional Director, 39 IBIA 283,290 (2004); County of Mille Lacs, Minnesota v. Midwest Regional Director, 37 IBIA 169, 173 (2002); see also Avoyelles Parish, Louisiana Police Jury v. Eastern Area Director, 34 IBIA 149, 153 (1999) ("A financially secure tribe might well need additional land in order to maintain or improve its economic condition if its existing land is already fully developed.").

The State and local governments commented that the No Action Alternative would meet the Nation's needs by allowing the Nation to continue to apply its business acumen and operate like a private landowner or corporation on fee land. In particular, Madison County commented that foreign nations conduct business in the State of New York either directly or indirectly through wholly-owned corporations (citing the Venezuelan company Citgo as an example), and that these nations pay taxes or negotiated payments in lieu of taxes and comply with State laws.

This comparison is not fitting. With the IRA and through 25 U.S.C. § 465, Congress provided a mechanism for protecting tribal lands through their acquisition by the

United States in trust. The basic features of trust status (i.e., application of tribal sovereignty and jurisdiction over the land to the exclusion of state and local control, immunity from state and local property taxation, protection of the land against alienation, and application of Federal laws unique in their application to trust lands) are largely uncharacteristic of lands held by private individuals or corporations, and are not subject to the same relationships with the state.

Further, while the New York State and local government comments focus on the Nation's business successes, a demonstration of necessity may take into account more than economic need and may also consider the tribe's need for land to support self-determination and tribal housing. The Department finds that the basic features of trust status will promote the Nation's ability to continue its existing uses of the Subject Lands as the Nation intends, thereby supporting tribal economic development, self-determination, and tribal housing.

The Nation has 32 acres that are under its sovereign authority following the Boylan litigation and no acres in trust status under 25 U.S.C. § 465.[6] The Oneidas once possessed approximately 300,000 acres within their reservation, nearly all of which was conveyed to the

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[6] The Nation might receive some additional lands in trust pursuant to excess Federal property policies and procedures. It is not known if or when such a transfer for the Nation will occur and, regardless, these additional lands are not a substitute for the Subject Lands with respect to meeting the Nation's current and short-term needs.

State without Federal approval in violation of the Non-Intercourse Act, 25 U.S.C. § 177. During the Department's evaluation of the Nation's fee-to-trust request, Madison County and Oneida County have sought to foreclose on the Nation's re-acquired lands. See Oneida Indian Nation of New York v. Madison County and Oneida County, Nos. 05-6408-cv (L), 06-5168-cv (CON), 06-5515-cv (CON) (2d Cir.). The State of New York has separately contended that the Nation's core enterprise, the Turning Stone Casino, is unlawful. See, e.g., Letter from Richard Platkin, Counsel to the Governor, to Philip Hogen, Chairman, National Indian Gaming Commission (Sept. 16, 2005).

Acquisition of the Subject Lands in trust will help to address the Nation's current and near term needs to permanently reestablish a sovereign homeland for its members and their families, preventing alienation of the lands or involuntary cessation of the Nation's various uses of the lands. The Nation's ability to exercise governmental authority over the lands and its uses, and to protect it for future generations, will promote the health, welfare, and social needs of its members and their families. In addition, the Nation has sought to diversify its economy and land base so that it is not as heavily dependent on its gaming enterprise, which is not a guaranteed future source of revenue. Placement of non-gaming lands into trust will support those efforts and provide lands for other member needs, thereby protecting tribal self-determination and bringing stability to the Nation. The Nation's uses of the Subject Lands to promote the health, welfare, and social needs of the Tribal community are described below.

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7.5 25 C.F.R. § 151.10(e) - Impact on the State and Its Political Subdivisions Resulting from Removal of the Land from the Tax Rolls

Section 151.10(e) requires consideration of the impact on the State and its political subdivisions resulting from removal of the land from the tax rolls.

By letters dated September 20, 2005, in accordance with 25 C.F.R. § 151.10, the Department notified the State and local governments that they would have 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes, and special assessments. As a matter of discretion, the Department divided the comment period among the three land groups and provided substantial extensions. The comment periods for the Group 1 and Group 2 lands were extended to January 1, 2006. The comment period for the Group 3 lands was extended to March 1, 2006. The Nation responded to the comments that were received.

State and local governments uniformly opposed acquisition of land in trust based on asserted loss of tax revenues. State and local governments also requested that the Secretary not acquire any land in trust unless and until the Nation has fully paid all taxes, penalties, and interest that the Nation is alleged to owe.

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As discussed below, potential fiscal impacts were comprehensively evaluated in the Final EIS, including in the development and selection of the Preferred Alternative (Alternative I). The Department finds that the impacts of removing the Subject Lands from the tax rolls are not significant when balanced with the benefits to the Nation of placing the Subject Lands into trust. This is based on the tax revenue loss that would result from acquiring the Subject Lands in trust considering the taxes that have actually been assessed and paid. This is also based on the degree to which the Nation's direct and indirect payments to the State and local governments offset the loss of real property taxes that would occur even if taxes are due and owing to the full extent alleged by Madison and Oneida Counties. Further, although it is not necessary to the Department's findings regarding the significance of the fiscal impacts of acquiring the Subject Lands in trust, the Department has determined that the Turning Stone Casino is being assessed unlawfully under IGRA and that a proper tax valuation would include the value of the land only, without the value of the gaming and gaming-related improvements. Finally, the Department has determined that bank letters of credit are sufficient to address tax liens on the Subject Lands for purposes of acquiring the lands in trust.

7.5.1 Analysis of Taxes Assessed and Payments Made

Under 25 C.F.R. § 151.10(e), the analysis of tax impacts is based on existing circumstances, i.e., taxes actually

assessed and paid. The Secretary is not required to speculate on the outcome of the pending litigation between the Nation and the Counties over taxes and related charges that mayor may not be owed by the Nation. Nor, contrary to the comments of local governments, is the Secretary required to speculate on potential revenue impacts from future development or improvement of the Nation's lands. See. e.g.; Skagit County, Washington v. Northwest Regional Director. 43 IBIA 62, 81-82 (2006); Shawano County. Wisconsin, Board of Supervisors v. Midwest Regional Director, 40 IBIA 241, 249 (2005); Rio Arriba, New Mexico, Board of Commissioners v. Acting Southwest Regional Director, 38 IBIA 18, 21 (2002); City of EagleButte, South Dakota v. Aberdeen Area Director, 33 IBIA 246, 248 (1999).

7.5.1.1 Potential Tax Revenue Loss If Taxes are Not Due and Owing

Pursuant to the Supreme Court's decision in City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005), the Nation may not unilaterally assert tribal tax immunity over its reacquired lands as a matter of Federal law. Madison and Oneida Counties have imposed real property taxes on the Nation's lands and have sought to foreclose on the lands for non-payment of taxes, penalties, and interest. However, Federal district court decisions subsequent to City of Sherrill have ruled, inter alia, that the taxes and related charges are unlawful under New York State law; that the Nation's lands are restricted against alienation pursuant to the Non-Intercourse Act, 25 U.S.C. § 177, and therefore are

not subject to foreclosure for non-payment; and that tribal sovereign immunity bars suits to collect. See Oneida Indian Nation of New York v. Madison County, 401 F. Supp. 2d 219 (N.D.N.Y. 2005), motion to alter. amend or obtain relief from the judgment denied, 235 F.R.D. 559 (2006); Oneida Indian Nation of New York v. Oneida County, 432 F. Supp. 2d 285 (N.D.N.Y. 2006).

With regard to the taxability of the Nation's lands under New York State law, the district court ruled:

> New York State Law provides that 'real property in any Indian reservation owned by the Indian nation, tribe or band occupying them shall be exempt from taxation.' N.Y. Real Prop. Tax Law § 454; N.Y. Indian Law § 6 (McKinney 2001) (directing that no taxes be assessed upon Indian reservation lands). The Nation's 'reservation was not disestablished.' City of Sherrill , 337 F.3d at 167. The properties at issue are located within the Nation's reservation. Pursuant to state law, taxes should not have been assessed against the Nation's properties and such properties are exempt from taxation. Therefore, the County's assessment of taxes upon the property and its attempts to foreclose for non-payment of such taxes is contrary to state law.

Madison and Oneida Counties appealed these decisions. Oneida Indian Nation of New York v. Madison County and Oneida County, Nos. 05-6408-cv (L), 06-5168-cv (CON), 06-5515-cv (CON) (2d Cir.).

In light of the ongoing dispute, the Department is only required to consider the taxes that have actually been assessed and paid. If the Nation prevails in the litigation, the Department's analysis of taxes actually assessed and paid, provided below, would support this final determination. In the event that the Nation does not prevail, the Department has, in its discretion, also considered the potential tax revenue losses to the State and local governments irrespective of whether the taxes have been paid. This analysis is provided in Sections 7.5.2 and 7.5.3 of this ROD, infra. In either case, the Department would acquire the Subject Lands in trust.

In addition, after the issuance of the Final EIS, the Nation provided irrevocable bank letters of credit to Madison and Oneida Counties for all of the taxes, penalties, and interest allegedly owed on all of the lands that are the subject of the tax foreclosure litigation (and other lands). If the Nation prevails, the funds will be credited back to the Nation. If the Counties prevail, the funds will be paid to the Counties. The Department takes no position here on the litigation itself.

7.5.1.1.1 Cities of Sherrill and Oneida

Due to the ongoing tax dispute, the Nation generally has not paid real property taxes to Madison or Oneida Counties. The Nation does, however, make property tax payments to the City of Sherrill in Oneida County and to the City of Oneida in Madison County pursuant to agreements reached with those cities in 2005 and 2006, respectively. See Final EIS, App. G.

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None of the Nation's lands located within the City of Sherrill will be placed into trust under this final determination. The Nation will continue to make payments pursuant to its agreement with the City of Sherrill.

Under the agreement between the Nation and the City of Oneida, the Nation paid $5.09 million in back taxes allegedly owed and the City agreed to remove any tax liens on the Nation's properties within the City. The Nation further agreed to make payments in future years, with certain reservations of rights. This agreement will not continue to apply to the Nation's lands that will be acquired in trust under this decision after formal acceptance of the lands into trust.

Under this final determination, 25 of the Nation's 45 tax parcels located in the City of Oneida will be acquired in trust. For FY 2008, the Nation paid for all of its lands located in the City of Oneida a total of approximately $739,280 in city, county, and school district tax bills for property taxes levied by the City of Oneida, Madison County, special assessment districts, and school district jurisdictions (i.e., the Oneida City, Stockbridge Valley, and Vernon-Verona Sherrill ("V.V.S.") School Districts). As a result of the Department's decision and by operation of the Nation's agreement with the City of Oneida, the property tax levying jurisdictions will annually lose a total of $618,029 in future tax revenues from the lands located in the City of Oneida to be acquired in trust. The City of Oneida would lose $58,888 annually, or 2.5% of City's total annual tax levy. Madison

County would lose $156,092 annually, or 0.56% of the County's tax levy. The annual school district property tax loss would be $333,412 for the Oneida City School District (2.7% of the levy), $22,976 for the Stockbridge Valley School District (1.1 % of the levy) and $192 for the V.V.S. School District (0.0001% of the levy). Special assessment districts within the City of Oneida (i.e., hydrant, library, and fire) would annually lose $46,469, or 8.7% of the levy.

The amount of taxes levied for 2008 against the 20 Nation tax parcels within the City of Oneida that will not be acquired in trust is approximately $121,251, inclusive of city, county, school, and special assessment districts. These annual tax revenues will continue to be collected under the agreement.

7.5.1.1.2 Counties of Madison and Oneida

Because no tax agreements have been reached between the Nation and Madison or Oneida Counties, no actual tax loss to either County would result from placement of the Subject Lands into trust, except for the amount to Madison County included in the Nation's FY 2008 payments to the City of Oneida discussed above.

In August 2005, the Nation made a one-time, non-refundable payment to Oneida County of $650,000. In return, Oneida County agreed to forbear from issuing and recording deeds to 59 Nation-owned properties in the name of the Oneida County Board of Legislators for

nonpayment of taxes during the pendency of Federal court tax litigation. The agreement was for the express purpose of avoiding the need for a preliminary injunction hearing in that action. Only if the Nation redeemed all 59 properties would the payment be credited toward the redemption prices of the properties. In December 2005, the Nation paid Oneida County $314,407.83 to redeem six tax lots (322.000-1-30, 322.000-2-19,322.000-2-28, 323.000-1-1.1, 323.000-1-1.3, and 323.000-1-2). A similar agreement was not reached for other parcels on which the County subsequently sought to foreclose. Accordingly, the Nation then sought and obtained injunctive relief with respect to all of the parcels. See Oneida Indian Nation v. Oneida County, 432 F. Supp. 2d 285, 286,288 <N.D.N.Y. 2006). The Nation's one-time payment to Oneida County under the foregoing agreement and its payment to redeem six tax lots do not constitute taxes actually assessed and paid for purposes of the Department's analysis of tax revenue loss.

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7.5.2 Potential Tax Revenue Loss If Taxes are Due and Owing

If the Nation does not prevail in the tax litigation, the Final EIS comprehensively evaluated the potential fiscal effects of placing the Nation's lands into trust under each of the alternatives analyzed. See Final EIS §§ 3.7, 4.7, 5.2, and App. E.

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The total annual property tax on Nation lands in 2005 is estimated to be $2.76 million, not including the Turning Stone Casino tax lot in the Town of Verona. Based on the 2005 tax rates and the Town's assessed value of the casino tax lot of$362.55 million (which the Department has determined is unlawful), the annual property tax on the casino tax lot is $12.2 million. The total annual property tax on the Nation's lands is $14.96 million, including county, municipal, school district, and special assessment district taxes.[7]

The Final EIS provided the estimated property tax effects of each alternative, including thecasino tax lot (using the Town of Verona's assessed valuation of

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[7] There is some difference between the property tax estimates contained in the Final EIS and the tax information contained in the Center for Governmental Research Report (February 2006) that was supplied by the Counties. The Final EIS estimate of total annual property taxes is $14.96 million (including the casino as assessed by the Town of Verona) whereas the report submitted by the Counties estimated the total annual property taxes to be $16.2 million (also including the casino tax lot). The difference between the estimates largely relates to the V.V.S. School District tax applicable to the casino tax lot. The Final EIS applies the V.V.S. School District tax rate for the 2004 levy/roll year. The report submitted by the Counties appears to have applied the V.V.S. School District tax rate for the 2005 levy/roll year. Having considered the difference between the estimates, the Department has determined that it does not lead to a different decision on the Nation's fee-to-trust request. The overall net fiscal impact to the State and local governments from placing the Subject Lands into trust is positive regardless of which data set is used.

$362.55 million) and excluding the casino tax lot (in light of the disagreement over the assessment of the casino tax lot). At the high end of potential tax revenue loss, the Proposed Action (Alternative A) would reduce the tax rolls by $2.76 million (excluding the casino tax lot) or $14.96 million (including the casino tax lot), assuming that taxes are due and owing. At the low end, the No Action Alternative (Alternative G) would allow for the collection of those tax dollars, again assuming that taxes are due and owing. Under the Preferred Alternative (Alternative I, $2.19 million (excluding the casino tax lot) or $14.39 million (including the casino tax lot) would be removed from the tax rolls annually, and $575,405 would remain subject to collection, if taxes are due and owing.

In addition to the analysis contained in the Final EIS, the Department also considered (a) the total real property tax levy of each jurisdiction (county, town, village, and school district) and (b) the real property tax levy on the Preferred Alternative lands within each jurisdiction, to determine (c) the real property tax levy on the Preferred Alternative lands as a percentage of the total real property tax levy of each jurisdiction. This provides an approximate calculation of the tax loss to each jurisdiction that would result from placing the Subject Lands into trust, if taxes are due and owing.

According to the New York State Office of the State Comptroller, the total real property tax levy of Oneida County in 2005 was $54,753,582. Based on the total levy and the 2005 tax bills issued to the Nation,

implementing the Preferred Alternative would reduce the Oneida County property tax revenues by approximately $3,257,470 (5.9% of the County's property tax levy),including the casino tax lot, if taxes are due and owing. Excluding the casino tax lot, the Oneida County property tax revenues would be reduced by approximately $203,378 (0.40% of the property tax levy), if taxes are due and owing. According to the Office of the State Comptroller, the total real property tax levy of Madison County in 2005 was $25,282,779. Implementing the Preferred Alternative would reduce the Madison County property tax revenues by approximately$220,282 (0.9% of the County's property tax levy), if taxes are due and owing. (The real property tax revenue loss to the Cities of Sherrill and Oneida based on the Nation's inter governmental agreements with them were discussed in Section 7.5.1.1.1 of this ROD, supra.)

The impacts of implementing the Preferred Alternative on the real property tax levies of individual towns, villages, and school districts are as follows.[8] The Towns of Augusta, Lincoln, Stockbridge, and Vernon would

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[8] This analysis is based on the 2005 property tax levy and includes the special assessment district tax levy as reported by the Office of the State Comptroller. Except for the casino tax lot, the tax on Nation land is derived from the Nation's tax bills for 2005 and the 2005/2006 school district taxes. The property tax on the casino tax lot is based on the July 1,2004 assessed valuation reported in the Final EIS. The special assessment district tax for the casino tax lot is based on the report submitted by New York State that was prepared by O'Brien and Gere.

experience an annual loss of property tax revenues of approximately $2,763 (0.6% of the property tax levy), $1,407 (0.4% of the levy), $17,999 (5.1% of the levy), and $1,819 (0.7% of the levy), respectively, if taxes are due and owing. The Town of Verona, where the Turning Stone Casino is located, would experience an annual loss of approximately $872,817 (107.6% of the property tax levy), including the casino tax lot, or $54,928 (6.8% of the levy), excluding the casino tax lot, if taxes are due and owing. The Village of Vernon would experience an annual loss of approximately $6,909 (2.5% of the levy), if taxes are due and owing. The Madison, Oneida City, and Stockbridge Valley School Districts would experience an annual loss of property tax revenues of approximately $8,284 (0.4% of the levy), $346,809 (3.3% of the levy), and $119,747 (6.5% of the levy), respectively, if taxes are due and owing. Finally, the V.V.S. School District, where the Turning Stone Casino is located, would experience an annual loss of approximately $10,160,130 (99.7% of the levy), including the casino tax lot, or $980,831 (9.6% of the levy), excluding the casino tax lot, if taxes are due and owing.[9]

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[9] The figures for Madison County and the Oneida City, Stockbridge Valley, and V.V.S. School Districts have not been reduced by the amounts that Madison County and these school districts would continue to receive through the Nation's intergovernmental agreement with the City of Oneida, which will continue to apply to the 20 tax lots within the City of Oneida that will not be acquired in trust under this final decision.

As indicated above, if the casino tax lot as assessed by the Town of Verona is included in the analysis, the tax revenue loss of the Town of Verona exceeds the Town's totally (i.e., is over 100%) and the tax revenue loss of the V.V.S. School District almost equals the levy (i.e., is almost 100%). This may be because the Town of Verona did not include the casino tax lot's assessed value in the Town's total assessed value used to set the tax rate. This, in turn, may be attributable to New York State legislation introduced on June 19, 2005 and effective August 16, 2005, which requires tax rates in Oneida County to be set as if the Nation's lands are tax exempt due to uncertainty over tax collections. 2005 NY ALS 5825, codified in part, NY CLS St. Fin. § 99-n. The combined effect of this legislation and the Town of Verona's valuation of the casino tax lot is that the Nation is being assessed taxes that surpass individual budget items of the Town (e.g., the Nation's share of the Town's $142,844 fire protection budget is $539,359).

7.5.3 Net Nation Financial Contributions to the State and Local Governments

In the Department's evaluation of impacts from removal of lands from the tax rolls, it may in its discretion consider the overall fiscal impacts of trust acquisition. This includes the degree to which the tribe's ongoing business activities generate economic and tax benefits to the local community that offset the taxes that would be lost as a result of trust acquisition. See, e.g .. County of Sauk. Wisconsin v. Midwest Regional Director, 45 IBIA 201, 214-17 (2007); Rio Arriba. New Mexico, Board of

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Commissioners v. Acting Southwest Regional Director, 38 IBIA 18, 25-26 (2002). The Department's analysis of the overall fiscal impacts of acquiring the Subject Lands in trust is summarized below. Additional information is contained in the Final EIS at Sections 3.7, 4.7, and 5.2, and Appendix E.

While forgone taxes could result in an adverse effect on local government revenues, the service agreements and the property, sales, and income taxes directly and indirectly generated by the Nation and its employees would continue to have a positive effect on the local economy and include:

- **Nation Grants and Payments to Local Governments.** The Nation has made direct payments to local governments totaling $38.5 million since 1995 in several categories of spending (i.e., Silver Covenant Payments, Municipal Service Agreements, Other Utility/Water Sewer Payments, and Infrastructure). This amount includes payments in the fall of 2005 and the spring of 2006 to the City of Sherrill and the City of Oneida, respectively, as well as $7.7 million in Silver Covenant payments to local governments that were discontinued in the fall of 2005. (The Silver Covenant payments have not been credited against taxes.) It can reasonably be expected that the Nation will continue to pay local governments for services provided.

- **Nation Employee Property Taxes.** Nation employees paid an estimated $5.55 million in local property taxes in 2005.

  o Under the Preferred Alternative (Alternative I), these revenues would be maintained and could increase slightly by 2011 because of modest inmigration associated with the Nation's job growth.

- **New York State Income Tax.** The Nation withheld and remitted $3.38 million in New York State income taxes from its employees in 2005.

  o Assuming that the average income tax per job remains constant, a total of $3.39 million in New York State income taxes would be withheld from the Nation's payroll in 2011 under the Preferred Alternative.

- **Nation Spending and Nation Employee Spending.** Nation vendor and employee spending stimulated $7.98 million in New York State tax payments for personal income, business, and sales taxes in 2005, and $1.20 million in local sales tax revenues for Madison and Oneida Counties and the study area municipalities.

  o Under the Preferred Alternative, New York Sate tax revenues are

anticipated to be $8.01 million in 2011.

o Annual local sales tax revenues created by employee and vendor spending would remain stable at $1.21 million under the Preferred Alternative. An increase in offsite visitor spending and the tertiary effect would generate additional local sales tax revenues.

- **Nation Payments to New York State.** The Nation paid $2.2 million and $2.8 million, respectively, to the New York State Police and the New York State Racing and Wagering Board in 2004 and 2005 for their services to the Turning Stone Resort & Casino, which payments are expected to continue in the future.

The Final EIS included two methods for estimating the economic cost to the State and local governments of providing services to the Nation. Under the first approach, the Department subtracted the costs to New York State and local governments attributable to the Nation from the economic benefits generated directly and indirectly by the Nation. The second approach is based on defining costs as the loss of property tax revenues on Nation land. The Department subtracted both property taxes and Nation payments that are reflective of the cost of services attributable to the Nation and not usually paid for with property tax

revenues (i.e., reimbursements to New York Sate and water, sewer, and utility payments) from the economic benefits generated directly and indirectly by the Nation.

7.5.3.1 Net Payments: Cost of Services Attributed to the Nation

In 2005, the total revenues produced directly and indirectly by the Nation (agreements and employee and multiplier taxes) totaled approximately $24.29 million, while its costs to New York State and local governments for services totaled approximately $7.54 million, resulting in a beneficial net contribution to New York State and local governments of $16.76 million.

For the analysis of the alternatives, the projected costs to New York State and local governments for all services required by the Nation in 2011 were contrasted with the estimated Nation-related payments in 2011. The Preferred Alternative (Alternative 1) is projected to result in a net contribution to the New York State and local governments of approximately $16.94 million.

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7.5.3.2 Net Payments: Loss of Property Tax Revenues

Under this approach, due to the dispute over taxation of the casino tax lot, total property tax loss was evaluated in three scenarios: (1) without the casino tax lot; (2) with the casino tax lot as assessed by the local

government; and (3) with the casino tax lot valued for non-gaming uses, based on non-gaming lands at comparable locations.

In the third scenario, the Department compared the Nation's total payments against property taxes that would be lost if the casino tax lot had been developed for non-gaming purposes. An analysis of land uses and valuation for property tax purposes was conducted at interchanges along the New York State Thruway (Exits 31 through 34, with the casino tax lot located within a mile of Thruway Exit 33). This was intended to obtain an estimate or range of the taxable assessed value that could apply to the 225-acre casino tax lot absent the casino and associated facilities. This analysis provided a range of values for the casino tax lot of between $6.2 million and $10.5 million.

In 2005, the uncollected property taxes (excluding the casino tax lot) combined with costs of services attributable to the Nation and usually not paid for with property tax revenues totaled $8.49 million. The Nation's total direct and indirect payments were $24.29 million. This results in a maximum net payment to the New York State and local governments of $15.90 million. Including the casino tax lot as assessed by the Town of Verona ($12.2 million in taxes based on a valuation of $340 million for the improvements and $22.55 million for the land) results in a minimum net payment of $4.76 million. Thus, under conditions where the Nation was generally not paying taxes, the Nation's direct and indirect contributions were greater than the unpaid real property taxes.

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Implementation of the Preferred Alternative (Alternative I) is projected to result in a net contribution to the New York State and local governments of between $16.66 million and $4.46 million, depending on taxable value of the casino tax lot. Detailed tables showing the effects on individual jurisdictions (State, county, city, town, village, school district) are located in Appendix E-3 of the Final EIS.

In all scenarios (with and without casino tax lot, and with casino tax lot valued at $6.5 million or $10.5 million), the net impact on individual jurisdictions is positive under the Preferred Alternative (Alternative I), with the following few exceptions: (1) with the casino tax lot included as assessed by the Town of Verona at $362.55 million, which the Department has determined is unlawful, Oneida County, the Town of Verona, and the V.V.S. School District would experience a net loss of $1.17 million, $651,600, and $8.45 million, respectively; (2) with the casino tax lot valued for non-gaming purposes at $10.5 million, the V.V.S. School District would experience a net loss of $364,100; (3) with the casino tax lot valued for non-gaming purposes at $6.2 million, the V.V.S. School District would experience a net loss of $262,500; and (4) by excluding the casino tax lot, the V.V.S. School District would experience a net loss of $122,400.

The results of the five net fiscal impacts analyses undertaken by the Department are summarized in Table 5.2-1 of the Final EIS.

In conclusion, based on the taxes actually assessed and paid, the impact of removing the Subject Lands from the tax rolls is not significant when balanced with the benefits to the Nation of acquiring the Subject Lands in trust. Even assuming, arguendo, that the Nation does not ultimately prevail in the tax litigation, the Department has considered the potential fiscal impacts on the State and local governments from placing the Subject Lands into trust. In all of the Departments' analyses of net fiscal impacts under the Preferred Alternative (Alternative 1), the overall net economic impacts projected to State and local governments are positive and substantial because of the Nation's direct and indirect economic contributions to the community. The Department considered that individual jurisdictions (e.g., the V.V.S. School District) may experience a net loss of revenues, but determined that the benefits to the Nation of acquiring the Subject Lands in trust outweigh these impacts.

In connection with the Nation's positive contributions, it is also noteworthy that the Nation has reaffirmed its commitment to continue to support and cooperate with the surrounding community. See Final EIS, App. J, Letter from Nation Representative Ray Halbritter to James Cason, Associate Deputy Secretary of the Interior (Jan. 7, 2008) ("The Nation's commitment to directly assist local governments will continue even if lands acquire trust status.... As the post trust era is likely still to be some time off, it is premature to make precise commitments .... Those in the community around us can continue to count on us, as they have in the past,

to make very significant grants, donations and other payments .... ").

The State and local governments recommended that the Department consider implementing the No Action Alternative (Alternative G), placing into trust only the casino tax lot (Alternative E), or selecting the County-Proposed Alternative (Alternative H). These alternatives would not meet the Nation's current and short-term needs. In addition, the overall net contributions to the State and local governments may be higher under the Preferred Alternative (Alternative 1) than under Alternatives E, H, and especially G, if the Nation's enterprises on the lands not acquired in trust were to close.

Based on the overall effects of placing the Nation's lands into trust and the benefits to the Nation, the Department would reach the same final determination even if taxes are due and owing to the full extent that they have been assessed. As the Department has determined, however, the Town of Verona's tax assessment of the Turning Stone Casino tax lot improvements violates IGRA. This is discussed in Section 7.5.4 of this ROD, below.

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7.5.5 Bank Letters of Credit as Satisfaction of Tax Liens

The regulations at 25 C.F.R. Part 151 provide that if the Secretary determines that he will approve a land-into-trust request. he will require title evidence meeting the Standards tor the Preparation of Title Evidence in Land Acquisitions by the United States, issued by the U.S. Department Justice. 25 C.F.R. § 151.13. The title examination must be completed, and liens that make title to the land unmarketable and other liens in the Secretary's discretion must be addressed, prior to formal acceptance of the lands into trust. See id. § 151.14; Avoyelles Parish, Louisiana, Police Jury v. Eastern Area Director. 34 IBIA 149, 153-54 (1999) ("[T]he requirement to furnish satisfactory title evidence does not arise until after a decision is made as to whether or not the land should be taken into trust.").

The Nation has already provided irrevocable bank letters of credit to Madison and Oneida Counties for all of the taxes, penalties, and interest allegedly owed on all of the lands that are included in the Nation's fee-to-trust request. excluding the Turning Stone Casino tax lot. See Letter from Michael Smith to Kaush Arha. Associate Solicitor, Department of the Interior (March 25, 2008) (enclosing irrevocable letters of credit issued on March 19,2008). The Nation has committed to obtain replacement or supplemental letters of credit to cover the sums billed by both Counties prior to the conclusion

of the pending tax litigation. See Letter from Michael Smith to Franklin Keel, Regional Director, BIA Eastern Region (March 6, 2008) (enclosing Letter from Michael Smith to Craig Alexander, Chief, Indian Resources Section, U.S. Department of Justice (March 5, 2008)). The Department has considered the letters of credit and the Nation's commitments, and determined that they will be adequate to satisfy tax liens for purposes of acquiring the Subject Lands in trust.

In its March 5, 2008 letter, the Nation stated that it is waiting for direction from the Department on how it should address taxes on the casino property, as the Department explained in the Final EIS that it was considering this matter. The Department has determined that the casino tax lot is not taxable to the extent of including the gaming and gaming-related improvements under Federal law. Therefore, the Nation must satisfy any tax liens on the casino tax lot either by paying the taxes, penalties, and interest allegedly owed based on the Town of Verona's assessment of the land without improvements ($22.5 million) or by providing a letter of credit to the taxing jurisdiction for the same.

As explained above, title issues need not be resolved prior to issuing a fee-to-trust decision, but they must be addressed prior to actual acceptance of the land into trust. The Department anticipates that the issue of the taxability of the casino tax lot under IGRA will be finally resolved prior to the time at which the Department may formalize acceptance of the land into trust. If litigation over the taxability of the casino tax lot is pending at the

time the Department could formalize acceptance of the casino tax lot into trust, the Department will require the Nation to provide a letter of credit to the United States for the difference between (a) the total taxes and related charges levied on the casino tax lot as of the date of formal acceptance and (b) the amount that the Nation paid or guaranteed through a letter of credit to the taxing jurisdiction. The Department will not formalize acceptance of lands into trust without an assurance that all appropriate real property taxes and related charges that are lawfully owed to the local governments, if any, have been or will be paid.

Madison and Oneida Counties objected generally, without reference to specific terms or conditions, to letters of credit for purposes of acquiring land in trust status, stating that issuance of the letters of credit provides no immediate revenues to the Counties. The purpose of the letters of credit, however, is to provide assurances that revenues will be paid over to the Counties if and when taxes are judicially determined to be due and owing. After lands are placed into trust, the exception for trust lands in the waiver of United States sovereign immunity in the Quiet Title Act, 28 U.S.C. § 2409a, would bar challenges to title to the lands. The letters of credit are guarantees of payment after placement of the lands into trust.

The Counties also contended that under N.Y. Real Property Tax Law §§ 902, 1312, taxes become a lien by statute and remain a lien until paid. In the pending tax appeal, the Nation is defending Federal district court

rulings that all of the taxes and related charges assessed on the Nation's lands are unlawful under State law. Moreover, the Department has determined that as a matter of F ederal law the taxes and related charges on the casino tax lot are unlawful in large part, and therefore the liens are in part invalid for that reason. In any case, the requirements for acquiring title to land in trust do not call for liens to be removed to the satisfaction of the local taxing authority; liens must be addressed to the satisfaction of the Federal government pursuant to Federal title standards. See 25 C.F .R. § 151.13; Section 6(a), Regulations of the Attorney General Promulgated in Accordance with the Provisions of Public Law 91-393 (1970) ("Prior to or at the time of acquisition of title to the property, except as to certain easements as hereinafter set out, all liens against the title must be fully paid and satisfied or adequate provision should be made therefore.") (emphasis added); Tohono O'Odham Nation v. Acting Phoenix Area Director, 22 IBIA 220, 235 (1992) (explaining that standard practice in acquisitions of title to land by the United States is to require liens to be paid or to require that adequate provision for satisfying them be made prior to trust acquisition). Letters of credit are adequate provision for tax liens on the Subject Lands.

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7.6.2.2 Municipal Service and Cross-deputization Agreements

Although the Nation has not paid property taxes, it has recognized that it uses many of the services of the municipalities in which it owns property. The Nation and local governments have signed agreements to provide a mechanism by which the Nation defrays the costs borne by local governments for services such as water, sewer, and fire protection. The Nation has contributed more than $11 million through these agreements. In addition, the Nation has made significant contributions, including for infrastructure development. benefiting both the Nation and local governments. These agreements and contributions, which display the Nation's willingness and ability to cooperate prior to City of Sherrill and currently, include the following:

- **Fire Protection.** Beginning in 1993 and continuing today, the Nation has provided funds to the Town of Verona Fire Department through a voluntary service agreement. Also, the Nation, the Verona Fire Department, and other fire departments from the surrounding area have created a Mutual Aid Plan ("MAP") to provide for enhanced emergency services coverage. The MAP details how a significant fire or emergency situation at the Turning Stone Resort & Casino would be staffed and managed. The Nation has also hired its own fire marshal, a former fire chief of the City of Rome, whose position is partially funded by the BIA.

- **Police Cross-deputization.** In 1994, the Nation and Madison and Oneida Counties entered into cross-deputization agreements. The local governments canceled these agreements in 2000, but the Nation's police officers continue to cooperate with surrounding police departments on law enforcement issues. The Nation's police force consists of 45 highly-trained Federal Deputy Special Officers commissioned through the Department of the Interior, including 38 sworn full-time officers and seven other employees. The Nation's police force was accredited by the Commission on Accreditation for Law Enforcement Agencies in 1999 and reaccredited in 2002, 2005, and 2008. This police force is in addition to State Police protection at the Turning Stone Casino, for which the Nation makes payments to the State.

- **Infrastructure Development.** In support of its own government and enterprises, and for the benefit of neighboring communities, the Nation financed the construction of a multimillion dollar water and sewer line and water tower, conveyed them to the Town of Verona, and now pays user fees along with other users. The Nation also contributed millions of dollars in sewer system improvements for the City of Oneida. Further, the Nation has offered to contribute $10 to $11 million to the development ofa new water system in Oneida County that would serve several towns and help to alleviate water supply issues. Development of the system, however, has been delayed due the New York State processes and procedures.

Additional information on these and other service agreements and contributions is detailed in the Final EIS at pages 3-345 to 3-356, Table 3.7-101, and Appendix B.

7.6.2.3 Intergovernmental Agreements With the Cities of Oneida and Sherrill

In 2005 and 2006, respectively, the Nation entered into intergovernmental agreements with the City of Oneida and the City of Sherrill regarding both tax and regulatory matters. See Final EIS, App. G. The Nation agreed to meet or exceed all health, safety, zoning, and signage standards and regulations generally applicable to the Nation's properties within the Cities, and the Nation and City officials agreed to consult and cooperate regarding public health and safety issues of mutual concern. In addition, existing non-conforming uses were deemed not to be in violation of the agreements. The agreements will not apply to land that is placed into trust for the Nation. None of the Nation's lands located within the City of Sherrill will be placed into trust under this decision. Some of the Nation's lands located within the City of Oneida (25 out of 45 tax lots) will be placed into trust under this decision.

The Nation has expressed its willingness to enter into intergovernmental agreements with other local governments. In addition, on February 12,2008, Madison County passed a resolution authorizing and directing the Chairman of the Board of Supervisors to work with the Nation "to promote the creation of wealth and

opportunity," "to ensure public safety, public health, and environmental protection," "to preserve and enhance the culture and quality of life," and to jointly develop and implement a comprehensive development plan. The Department is aware that discussions have been occurring between the Nation and both Madison County and Oneida County leadership to reach these goals. In furtherance of resolving disputes, the Nation has provided letters of credit to both Counties for the taxes, penalties, and interest allegedly owed on Nation lands, including thousands of acres that will not be acquired in trust under this decision, which will guarantee payment of taxes and related charges that are judicially determined to be due and owing, if any, on the lands.

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7.6.3.4 Governance and Management of Checkerboard Trust Lands

The Department recognizes that checkerboard ownership could affect a community's ability to effectively plan and regulate. In its administration of millions of acres of trust properties, the Department has observed some difficulties in the ownership and management of checkerboard lands that are a mix of non-trust and trust property, particularly with respect to fractionated interests in individual Indian lands owned in restricted status or held by the United States in trust status. Difficulties have included: complications in leasing of either trust or non-trust properties or a combination of both; obtaining access and rights-of-way;

large scale land use planning and natural resource regulation; and the application of different jurisdictional codes and regulations to different landowners. With regard to property taxes, however, checkerboarding is not a material concern because the tax assessor must make a property-by-property determination of whether or not a tax exemption or immunity applies. See County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 265 (1992).

With respect to the Nation's lands, there is currently an alternating pattern of enforcement of Nation and State and local laws due to ongoing disputes. In the Cities of Sherrill and Oneida, the Nation has entered into intergovernmental agreements whereby the Nation follows local requirements. Elsewhere, jurisdictional disputes continue. On one hand, placing all of the Nation's lands into trust would resolve disputes over which government has jurisdiction. On the other hand, the State and local governments contend that the Nation's lands as a whole are not contiguous or compact, and that checkerboard jurisdiction could affect their ability to plan and regulate effectively. Placement of the Subject Lands into trust under this final determination is anticipated to address both of these issues: first, this final decision will settle jurisdiction in favor of the Nation over areas where the Nation's development is focused and its presence is most pronounced, and second, the Subject Lands are highly contiguous and compact, thereby facilitating the Nation's successful governance and minimizing potential impacts to the State and local governments. Overall, placing the Subject Lands into

trust is not anticipated to make management significantly more difficult, because the Nation will assume jurisdiction over the lands and is prepared to do so, as evidenced by its past management of these lands.

7.7 25 C.F.R. § 151.10(g) - Whether the BIA is Equipped to Discharge Additional Responsibilities Resulting from Acquisition of the Lands in Trust Status

Section 151.10(g) requires consideration of the BIA' s ability to discharge additional responsibilities resulting from the acquisition of the lands in trust. Over its long history of administering Indian trust assets, the Department has also observed some difficulties in its own administration of those assets, most notably with respect to fractionated interests in individual Indian lands in restricted-fee or trust status. Acquisition of the Subject Lands in trust, however, is anticipated to impose limited additional responsibilities on the BIA beyond those already inherent in the Federal trusteeship to the Nation.

The Nation will continue its existing uses of the Subject Lands, which uses the Nation conducted prior to applying for acquisition of the lands in trust. The Nation submitted its fee-to-trust request for the purpose of exerting sovereign authority over its reacquired lands and, consequently, acquiring the Subject Lands in trust will result in increased tribal self-determination and self-sufficiency. The Nation will pay for any municipal

services that may be required in connection with the Subject Lands. In addition, the Nation has indicated that leasing issues are unlikely to arise, because it does not lease its lands with exception for informal arrangements with local farmers. As such, the BIA is able to administer any additional responsibilities that may result from acquisition of the Subject Lands in trust. Moreover, the highly contiguous and compact character of the Subject Lands will facilitate the BIA's discharge of its responsibilities concerning the lands.

The lands that will not be acquired in trust under this final determination are less contiguous and located farther from the Turning Stone Resort & Casino properties in Oneida County and the Nation's center of government in Madison County, and as a result would be anticipated to place additional administrative burdens on the BIA if and when on-site visits are necessary. For example, the BIA experienced additional administrative burdens in conducting environmental site assessments on some non-contiguous properties, not included in the Preferred Alternative, during the processing of the Nation's fee-to-trust request. These additional burdens were also attributable in part, however, to new Federal requirements for conducting these assessments.

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7.9.1 Nation's Responses to Comments

Pursuant to 25 C.F.R. § 151.10, the Nation was provided a copy of the comments received from the State, local, and other tribal governments and given an opportunity to respond to them. The Department has reviewed the Nation's responses to the comments and other information submitted by the Nation in support of its fee-to-trust request, and finds that the Nation has adequately addressed the concerns of the State, local, and other tribal governments, as well as the Department, with respect to acquiring the Subject Lands in trust.

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Supreme Court, U.S.
FILED
DEC 6 - 2010
OFFICE OF THE CLERK

No. 10-72

IN THE
Supreme Court of the United States

MADISON COUNTY and
ONEIDA COUNTY, NEW YORK

Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK,

Respondent,

STOCKBRIDGE-MUNSEE COMMUNITY,
BAND OF MOHICAN INDIANS,

Putative Intervenor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL JOINT APPENDIX

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Citizens Bank

International Division
20 Cabot Road
Medford, MA 02155 USA
888 868 0214 tel
SWIFT CTZIUS33 TELEX 221047 CTZINTL

IRREVOCABLE STANDBY LETTER OF CREDIT NUMBER S905734

ISSUING BANK:
RBS CITIZENS, N.A.
INTERNATIONAL TRADE DEPT.
20 CABOT ROAD, M/S MMF470
MEDFORD, MA 02155 U.S.A.

PLACE AND DATE OF ISSUE:
MEDFORD, MA
MARCH 20, 2008

PLACE AND DATE OF EXPIRY:
AT OUR COUNTERS
SEPTEMBER 30, 2009

BENEFICIARY:
MADISON COUNTY TREASURER
P.O. BOX 665
WAMPSVILLE, NEW YORK 13163

APPLICANT:
ONEIDA INDIAN NATION
223 GENESEE ST
ONEIDA, NY 13421

UP TO AN AGGREGATE AMOUNT THEREOF: USD 4,612,339.07

PARTIAL DRAWINGS: PERMITTED

CREDIT AVAILABLE WITH:
RBS CITIZENS, N.A.
INTERNATIONAL TRADE DEPT.
20 CABOT ROAD, M/S MMF470
MEDFORD, MA 02155 U.S.A.

WE HEREBY ESTABLISH OUR IRREVOCABLE STANDBY LETTER OF CREDIT NO.S905734 IN YOUR FAVOR FOR THE ACCOUNT OF ONEIDA INDIAN NATION UP TO THE AGGREGATE AMOUNT OF FOUR MILLION SIX HUNDRED TWELVE THOUSAND THREE HUNDRED THIRTY NINE AND 07/100 U.S. DOLLARS (USD 4,612,339.07) EFFECTIVE IMMEDIATELY. THIS LETTER OF CREDIT IS AVAILABLE BY PRESENTATION OF DOCUMENTS DETAILED HEREIN.

1) THE ORIGINAL LETTER OF CREDIT AND ALL AMENDMENTS THERETO, IF ANY FOR OUR ENDORSEMENT OF ANY PAYMENTS EFFECTED BY US; AND

2) SATISFACTION OF THE CONDITIONS SET FORTH IN EXHIBIT A, AS CONFIRMED BY AN OPINION LETTER ISSUED BY AN INDEPENDENT COUNSEL THAT DOES NOT REPRESENT EITHER THE APPLICANT OR THE BENEFICIARY.

CONTINUED ON NEXT PAGE

Citizens Bank

International Division
20 Cabot Road
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888 869 0212 tel
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IT IS A CONDITION OF THIS LETTER OF CREDIT THAT IT SHALL BE DEEMED AUTOMATICALLY EXTENDED WITHOUT AMENDMENT FOR ONE YEAR FROM ITS EXPIRY DATE, OR FROM ANY FUTURE EXPIRY DATE, UNLESS AT LEAST THIRTY (30) DAYS PRIOR TO ANY SUCH EXPIRY DATE, WE SHALL NOTIFY YOU BY WRITTEN NOTICE SENT BY REGISTERED MAIL OR OVERNIGHT COURIER, THAT WE ELECT NOT TO CONSIDER THIS LETTER OF CREDIT EXTENDED FOR ANY SUCH ADDITIONAL PERIOD.

WE HEREBY ENGAGE WITH YOU THAT ALL DOCUMENTS DRAWN UNDER AND IN COMPLIANCE WITH THE TERMS OF THIS CREDIT WILL BE DULY HONORED UPON PRESENTATION TO OUR OFFICE AT 20 CABOT ROAD, MAIL STOP: MMF470, MEDFORD, MA 02155 USA ON OR BEFORE THE CURRENT OR ANY FUTURE EXPIRY DATE

EXCEPT AS OTHERWISE EXPRESSLY STATED HEREIN, THIS CREDIT IS SUBJECT TO INTERNATIONAL STANDBY PRACTICES (ISP98) INTERNATIONAL CHAMBER OF COMMERCE PUBLICATION NO. 590.

PLEASE ADDRESS ANY INQUIRIES OR CORRESPONDENCE TO ATTN: JOH REED, INTERNATIONAL DEPT., QUOTING OUR REFERENCE NO: S905734
BY PHONE: (781) 655-4376, BY FAX: (781) 391-8701
BY SWIFT: CTZIUS33, BY TELEX: 211047 CTZINTL

AUTHORIZED SIGNATURE AUTHORIZED SIGNATURE

RBS

Exhibit A

As used herein, "the federal litigation" means litigation, including appellate review as of right or by petition for writs of certiorari, in *Oneida Indian Nation of New York v. Madison County*, No. 00-CV-506 (N.D.N.Y.).

As used herein, "the state litigation" means litigation, including appellate review as of right or permissively or discretionarily or by petitions for writs of certiorari, in *Oneida Indian Nation of New York v. Fifer, et al.*, Index nos. 1532, 1534-1538 and 1606 (Supreme Court, Madison County).

Upon a final, unreviewable judgment in the federal litigation or in the state litigation has determined that the properties listed in the accompanying Exhibit B are not subject to a tax exemption, then, under the accompanying letter of credit, payment shall be made to Madison County in an amount equal to (and, as to each property, not greater than) all taxes shown as principal in Exhibit B; provided, however, that payment shall be no more than required by the proper level of tax assessment determined in the state litigation, which assessment level shall apply to all years in issue, and provided that payment will await conclusion of the state litigation if, at the time of a final unreviewable judgment in the federal litigation, the proper level of tax assessment remains to be determined in the state litigation. The amount to be paid shall be confirmed in an opinion letter issued by an independent counsel selected by the Issuing Bank.

Upon a final, unreviewable judgment in the federal litigation has determined that some or all charged penalties or interest may be imposed on the Nation in consequence of taxes due, then, under the accompanying letter of credit, payment shall be made to Madison County in an amount equal to (and, as to each property, not greater than) the penalties and interest determined to be

owed; provided, however, that payment shall be no more than permitted by the federal judgment and required by the proper level of tax assessment determined in the state litigation, which assessment level shall apply to all years in issue, and provided that payment will await conclusion of the state litigation if, at the time of a final unreviewable judgment in the federal litigation, the proper level of tax assessment remains to be determined in the state litigation. The amount to be paid shall be confirmed in an opinion letter issued by an independent counsel selected by the Issuing Bank.

Payment under the foregoing provisions shall be reduced to the extent that there is agreement between the Oneida Nation of New York and Madison County, New York, which agreement shall be reflected in a writing signed by the affected parties, and to the extent that the Nation has made any payment to Madison County with respect to bills for taxes, penalties or interest.

Notwithstanding any of the foregoing, no payment will be made as to any taxes, or any interest or penalties in relation to taxes, imposed or accrued after the actual transfer of any property listed in Exhibit B to the United States to be held in trust.

Exhibit B
Madison County

Oneida Nation Parcel #	County Tax Map Number	Principal	Interest & Penalties	Total
2	54.-1-30	$0.00	$0.00	$0.00
3	55.-1-3	$0.00	$0.00	$0.00
4	47.-1-50.1	$0.00	$0.00	$0.00
5	47.-1-50	$0.00	$0.00	$0.00
6	47.-1-46	$0.00	$0.00	$0.00
7	54.-1-14.2	$0.00	$0.00	$0.00
14	47.-1-50.2	$0.00	$0.00	$0.00
15	47.-1-51	$0.00	$0.00	$0.00
18	47.-1-42	$0.00	$0.00	$0.00
21	47.-1-43	$0.00	$0.00	$0.00
33	36.62-2-21	$110,865.77	$90,274.75	$201,140.52
57	75.-1-4.15	$0.00	$0.00	$0.00
57	75.-1-4.16	$0.00	$0.00	$0.00
75	36.5-1-20	$20,923.25	$14,165.45	$35,088.70
76	36.6-1-1	$760,884.64	$403,805.92	$1,164,690.56
77	36.6-1-3	$4,537.42	$4,275.56	$8,812.98
78	36.6-1-4	$9,601.02	$7,491.92	$17,092.94
79	36.38-1-32	$19,039.06	$16,591.61	$35,630.67
80	36.38-1-34	$20,187.14	$15,873.90	$36,061.04
81	36.-1-2	$14,976.47	$11,278.73	$26,255.20
87	36.38-1-33	$21,337.80	$15,230.84	$36,568.64
94	91.-1-51	$53,802.69	$35,828.66	$89,631.35
95	37.44-1-3	$0.00	$0.00	$0.00
98	28.-2-13.2	$3,716.63	$3,493.62	$7,210.25
98	28.-2-13.12	$8,229.07	$6,411.38	$14,640.45
98	28.-2-13.11	$29,256.09	$19,045.62	$48,301.71
100	38.29-1-2	$0.00	$0.00	$0.00
100	38.29-1-3	$0.00	$0.00	$0.00
100	38.29-1-36	$0.00	$0.00	$0.00
111	36.38-1-36	$30,140.69	$19,293.73	$49,434.42
120	61.-1-10.2	$52,829.36	$31,781.06	$84,610.42
126	54.-1-21.11	$0.00	$0.00	$0.00
127	54.-1-32.2	$0.00	$0.00	$0.00
128	55.-1-4.2	$0.00	$0.00	$0.00
128	55.-1-7	$0.00	$0.00	$0.00
128	55.-1-38	$0.00	$0.00	$0.00
128	54.-1-33	$0.00	$0.00	$0.00
129	54.-3-4	$2,072.69	$2,338.34	$4,411.03
129	54.-3-11	$6,772.75	$2,977.31	$9,750.06
130	54.-3-8	$32,129.63	$12,988.66	$45,118.29
131	54.-2-2	$15,734.83	$9,719.83	$25,454.66
131	63.-1-2.1	$53,206.95	$26,867.23	$80,074.18
132	54.-2-5	$7,154.99	$5,021.61	$12,176.60
133	55.-2-5.12	$2,219.25	$2,459.45	$4,678.70
134	55.-2-9	$2,013.23	$2,258.53	$4,271.76
135	55.-2-21.12	$31,774.07	$14,175.49	$45,949.56
136	65.-1-6	$10,364.06	$6,728.87	$17,092.93
141	7.79-1-61.1	$22,048.94	$16,597.04	$38,645.98
145	13.23-1-5	$48,712.34	$27,034.27	$75,746.61
145	13.23-1-6	$156,894.95	$88,144.89	$245,039.84

Exhibit B
Madison County

Oneida Nation Parcel #	County Tax Map Number	Principal	Interest & Penalties	Total
145	13.23-1-7	$1,415.75	$1,967.37	$3,383.12
146	37.44-1-1	$0.00	$0.00	$0.00
146	37.44-1-1.1	$0.00	$0.00	$0.00
146	37.44-2-2	$0.00	$0.00	$0.00
146	37.44-2-1	$0.00	$0.00	$0.00
150	13.-1-37	$20,225.65	$12,509.45	$32,735.10
151	54.-2-6.1	$6,461.74	$4,687.00	$11,148.74
152	54.-2-3.62	$50.51	$1,076.79	$1,127.30
152	54.-2-3.12	$27,279.03	$12,318.51	$39,597.54
152	54.-2-3.13	$378.92	$1,250.99	$1,629.91
152	54.-2-6.22	$7,250.14	$5,115.53	$12,365.67
153	54.-2-8.12	$10,603.23	$6,932.26	$17,535.49
155	63.-1-2.2	$19,851.16	$11,420.75	$31,271.91
159	19.-1-25	$39,092.75	$22,018.02	$61,111.77
159	19.-1-27	$10,556.54	$6,545.48	$17,102.02
160	18.-2-4	$9,001.22	$5,270.64	$14,271.86
161	18.-2-1	$579.66	$1,183.77	$1,763.43
162	18.-1-14	$3,082.35	$2,671.54	$5,753.89
163	18.-1-9.1	$5,432.41	$3,787.71	$9,220.12
166	46.-1-4.1	$0.00	$0.00	$0.00
166	46.-1-5.11	$0.00	$0.00	$0.00
167	55.-2-21.11	$26,493.49	$10,661.76	$37,155.25
167	55.-2-22	$101.04	$1,103.61	$1,204.65
168	64.-1-2	$15,503.55	$9,099.58	$24,603.13
168	64.-1-3.1	$4,781.98	$3,503.54	$8,285.52
168	64.-1-3.2	$4,459.76	$3,338.16	$7,797.92
168	64.-1-6	$9,864.40	$6,080.41	$15,944.81
168	64.-1-17	$5,145.13	$3,693.42	$8,838.55
168	64.-1-18	$45,432.43	$22,596.20	$68,028.63
168	64.-1-24.1	$5,975.07	$4,156.99	$10,132.06
168	64.-1-24.31	$1,297.85	$1,735.70	$3,033.55
168	64.-1-35	$669.61	$1,394.13	$2,063.74
169	73.-1-4	$17,592.41	$8,572.42	$26,164.83
171	74.-1-16.1	$104,833.55	$56,661.55	$161,495.10
171	74.-1-9	$12,031.57	$7,371.43	$19,403.00
171	74.-1-17	$6,629.02	$4,585.46	$11,214.48
171	74.-1-19	$15,540.21	$9,322.54	$24,862.75
171	74.-1-18	$5,915.02	$4,293.55	$10,208.57
173	83.-1-18	$13,994.65	$8,473.80	$22,468.45
174	83.-1-6.1	$5,885.84	$4,172.28	$10,058.12
178	54.-1-31	$0.00	$0.00	$0.00
185	13.-1-1.11	$12,540.13	$7,864.77	$20,404.90
185	13.-1-1.13	$11,836.94	$6,902.72	$18,739.66
185	12.-2-25.12	$2,890.51	$2,411.13	$5,301.64
191	13.-1-1.14	$3,223.54	$2,553.68	$5,777.22
195	7.79-1-61.2	$188.07	$1,145.31	$1,333.38
196	63.-1-3	$15,049.85	$8,287.04	$23,336.89
198	35.8-1-5	$32,033.60	$15,786.02	$47,819.62
200	89.-1-5	$20,204.20	$11,382.51	$31,586.71
204	13.22-1-3	$22,557.34	$11,783.02	$34,340.36

Exhibit B
Madison County

Oneida Nation Parcel #	County Tax Map Number	Principal	Interest & Penalties	Total
207	54.-1-29.1	$0.00	$0.00	$0.00
208	54.-1-32.1	$0.00	$0.00	$0.00
209	55.-1-4.1	$0.00	$0.00	$0.00
210	55.-2-5.11	$118,288.72	$57,200.23	$175,488.95
211	55.-2-7	$28,938.96	$14,673.68	$43,612.64
212	55.-2-8.1	$9,705.88	$5,355.04	$15,060.92
213	64.-1-1	$34,139.42	$17,148.86	$51,288.28
214	64.-1-13.1	$8,305.88	$4,675.19	$12,981.07
215	13.22-1-11	$12,395.60	$6,526.49	$18,922.09
216	13.22-1-8	$50,271.48	$25,313.93	$75,585.41
217	13.22-1-7	$27,120.15	$14,019.85	$41,140.00
218	13.22-1-6	$12,748.59	$7,100.04	$19,848.63
219	13.6-1-10	$296,000.08	$132,113.46	$428,113.54
226	13.6-1-12	$18,608.88	$9,947.27	$28,556.15
227	64.-1-29	$0.00	$0.00	$0.00
229	38.57-1-15.2	$0.00	$0.00	$0.00
231	38.65-1-14	$0.00	$0.00	$0.00
238	38.49-1-65	$0.00	$0.00	$0.00
237	38.49-1-67	$0.00	$0.00	$0.00
241	13.22-1-9	$15,193.47	$6,335.01	$21,528.48
241	13.22-1-12	$6,325.03	$3,368.25	$9,693.28
243	38.57-1-15.3	$0.00	$0.00	$0.00
245	30.81-1-70	$0.00	$0.00	$0.00
246	38.57-1-15	$0.00	$0.00	$0.00
249	30.81-1-69	$0.00	$0.00	$0.00
250	38.62-1-3	$0.00	$0.00	$0.00
255	70.-1-17	$1,211.11	$1,206.95	$2,418.06
255	61.-1-27	$5,893.87	$3,117.78	$9,011.65
255	61.-1-28	$9,971.15	$4,453.30	$14,424.45
258	38.57-1-19	$0.00	$0.00	$0.00
282	65.-1-10	$11,882.32	$4,496.28	$16,358.60
283	74.-1-16.5	$654.35	$813.31	$1,467.66
288	28.-1-77.1	$15,121.84	$5,677.61	$20,799.25
288	28.-1-77.2	$19,309.94	$7,945.04	$27,254.98
289	35.-1-28.1	$9,552.65	$3,701.03	$13,253.68
290	35.8-1-6	$14,407.92	$5,062.26	$19,470.18
291	46.-1-62.2	$0.00	$0.00	$0.00
291	27.-3-23	$327.74	$709.11	$1,036.85
291	27.-3-22	$637.60	$812.16	$1,449.76
291	27.-3-21	$1,334.68	$1,045.62	$2,380.30
291	27.-3-20	$12,580.89	$4,777.42	$17,358.31
291	27.20-1-6	$12,166.59	$4,547.14	$16,713.73
299	38.49-1-69	$0.00	$0.00	$0.00
304	54.-3-5.11	$10,336.61	$3,436.05	$13,772.66
304	63.-2-2	$4,491.36	$1,803.71	$6,295.07
307	35.-1-26	$9,040.61	$3,132.75	$12,173.36
310	83.-1-10	$7,802.76	$2,544.89	$10,347.65
310	83.-1-14.1	$2,685.52	$1,227.60	$4,113.12
310	92.-1-15.2	$18,521.57	$5,434.30	$23,955.87
310	92.-1-16	$12,144.48	$3,705.11	$15,849.59

Exhibit B
Madison County

Oneida Nation Parcel #	County Tax Map Number	Principal	Interest & Penalties	Total
311	28.-2-14	$1,558.37	$802.10	$2,360.47
314	72.-1-1.21	$657.16	$394.08	$1,051.24
314	72.-1-1.22	$1,003.11	$813.35	$1,816.46
315	72.-1-38	$3,545.48	$1,410.25	$4,955.73
315	64.-1-15.2	$17,467.34	$5,005.20	$22,472.54
317	92.-1-15.1	$1,045.37	$731.72	$1,777.09
322	47.-1-61	$0.00	$0.00	$0.00
329	36.5-1-7.5	$893.28	$286.63	$1,179.91
330	30.47-1-1.1	$0.00	$0.00	$0.00
		$2,979,845.21	$1,632,493.86	$4,612,339.07

Citizens Bank

International Division
20 Cabot Road
Medford, MA 02155 USA
888 868 0212 tel
SWIFT CTZIUS33 TELEX 221047 CTZINTL

IRREVOCABLE STANDBY LETTER OF CREDIT NUMBER S905733

ISSUING BANK:
RBS CITIZENS, N.A.
INTERNATIONAL TRADE DEPT.
20 CABOT ROAD, M/S MMF470
MEDFORD, MA 02155 U.S.A.

PLACE AND DATE OF ISSUE:
MEDFORD, MA
MARCH 20, 2008

PLACE AND DATE OF EXPIRY:
AT OUR COUNTERS
SEPTEMBER 30, 2009

BENEFICIARY:
ONEIDA COUNTY COMMISSIONER OF
FINANCE
800 PARK AVENUE
UTICA, NEW YORK 13501

APPLICANT:
ONEIDA INDIAN NATION
223 GENESSEE ST
ONEIDA, NY 13421

UP TO AN AGGREGATE AMOUNT THEREOF: USD 8,904,166.46

PARTIAL DRAWINGS: PERMITTED

CREDIT AVAILABLE WITH:
RBS CITIZENS, N.A.
INTERNATIONAL TRADE DEPT.
20 CABOT ROAD, M/S MMF470
MEDFORD, MA 02155 U.S.A.

WE HEREBY ESTABLISH OUR IRREVOCABLE STANDBY LETTER OF CREDIT NO.S905733 IN YOUR FAVOR FOR THE ACCOUNT OF ONEIDA INDIAN NATION UP TO THE AGGREGATE AMOUNT OF EIGHT MILLION NINE HUNDRED FOUR THOUSAND ONE HUNDRED SIXTY SIX AND 46/100 U.S. DOLLARS (USD 8,904,166.46) EFFECTIVE IMMEDIATELY. THIS LETTER OF CREDIT IS AVAILABLE BY PRESENTATION OF DOCUMENTS DETAILED HEREIN.

1) THE ORIGINAL LETTER OF CREDIT AND ALL AMENDMENTS THERETO, IF ANY FOR OUR ENDORSEMENT OF ANY PAYMENTS EFFECTED BY US; AND

2) SATISFACTION OF THE CONDITIONS SET FORTH IN EXHIBIT A, AS CONFIRMED BY AN OPINION LETTER ISSUED BY AN INDEPENDENT COUNSEL THAT DOES NOT REPRESENT EITHER THE APPLICANT OR THE BENEFICIARY.

CONTINUED ON NEXT PAGE

Citizens Bank

International Division
20 Cabot Road
Medford MA 02155 USA
888 868 0 [illegible] tel
SWIFT: CTZIUS33 TELEX 211047 CTZINTL

IT IS A CONDITION OF THIS LETTER OF CREDIT THAT IT SHALL BE DEEMED AUTOMATICALLY EXTENDED WITHOUT AMENDMENT FOR ONE YEAR FROM ITS EXPIRY DATE, OR FROM ANY FUTURE EXPIRY DATE, UNLESS AT LEAST THIRTY (30) DAYS PRIOR TO ANY SUCH EXPIRY DATE, WE SHALL NOTIFY YOU BY WRITTEN NOTICE SENT BY REGISTERED MAIL OR OVERNIGHT COURIER, THAT WE ELECT NOT TO CONSIDER THIS LETTER OF CREDIT EXTENDED FOR ANY SUCH ADDITIONAL PERIOD.

WE HEREBY ENGAGE WITH YOU THAT ALL DOCUMENTS DRAWN UNDER AND IN COMPLIANCE WITH THE TERMS OF THIS CREDIT WILL BE DULY HONORED UPON PRESENTATION TO OUR OFFICE AT 20 CABOT ROAD, MAIL STOP: MMF470, MEDFORD, MA 02155 USA ON OR BEFORE THE CURRENT OR ANY FUTURE EXPIRY DATE

EXCEPT AS OTHERWISE EXPRESSLY STATED HEREIN, THIS CREDIT IS SUBJECT TO INTERNATIONAL STANDBY PRACTICES (ISP98) INTERNATIONAL CHAMBER OF COMMERCE PUBLICATION NO. 590.

PLEASE ADDRESS ANY INQUIRIES OR CORRESPONDENCE TO ATTN: JOH REED, INTERNATIONAL DEPT., QUOTING OUR REFERENCE NO: S905733
BY PHONE: (781) 655-4376, BY FAX: (781) 391-8701
BY SWIFT: CTZIUS33, BY TELEX: 211047 CTZINTL

AUTHORIZED SIGNATURE AUTHORIZED SIGNATURE

RBS

Exhibit A

As used herein, "the federal litigation" means litigation, including appellate review as of right or by petition for writs of certiorari, in *Oneida Indian Nation of New York v. Oneida County*, No. 05-CV-945 (N.D.N.Y.).

As used herein, "the state litigation" means litigation, including appellate review as of right or permissively or discretionarily or by petitions for writs of certiorari, in *Oneida Indian Nation of New York v. Town of Vernon, et al.*, Nos. 05-740, 741, 751, 759, 738, 761, & 760 (Supreme Court, Oneida County).

Upon a final, unreviewable judgment in the federal litigation or in the state litigation has determined that the properties listed in the accompanying Exhibit B are not subject to a tax exemption, then, under the accompanying letter of credit, payment shall be made to Oneida County in an amount equal to (and, as to each property, not greater than) all taxes shown as principal in Exhibit B; provided, however, that payment shall be no more than required by the proper level of tax assessment determined in the state litigation, which assessment level shall apply to all years in issue, and provided that payment will await conclusion of the state litigation if, at the time of a final unreviewable judgment in the federal litigation, the proper level of tax assessment remains to be determined in the state litigation. The amount to be paid shall be confirmed in an opinion letter issued by an independent counsel.

Upon a final, unreviewable judgment in the federal litigation has determined that some or all charged penalties or interest may be imposed on the Nation in consequence of taxes due, then, under the accompanying letter of credit, payment shall be made to Oneida County in an amount equal to (and, as to each property, not greater than) the penalties and interest determined to be

owed; provided, however, that payment shall be no more than permitted by the federal judgment and required by the proper level of tax assessment determined in the state litigation, which assessment level shall apply to all years in issue, and provided that payment will await conclusion of the state litigation if, at the time of a final unreviewable judgment in the federal litigation, the proper level of tax assessment remains to be determined in the state litigation. The amount to be paid shall be confirmed in an opinion letter issued by an independent counsel.

Payment under the foregoing provisions shall be reduced to the extent that there is agreement between the Oneida Nation of New York and Oneida County, New York, which agreement shall be reflected in a writing signed by the affected parties, and to the extent that the Nation has made any payment to Oneida County with respect to bills for taxes, penalties or interest.

Notwithstanding any of the foregoing, no payment will be made as to any taxes, or any interest or penalties in relation to taxes, imposed or accrued after the actual transfer of any property listed in Exhibit B to the United States to be held in trust.

Exhibit B
Oneida County
(as of 8/31/07)

Oneida Nation Parcel #	County Tax Map Number	Original Tax + Local Fee	Accrued Taxes (Tax, Fee & Penalties)	Interest	Stub Search & Advertising Fee	Total
8	298.000-1-30.3	$188,200.00	$207,426.20	$12,998.37		$220,424.57
9	298.000-1-38	$136,660.86	$150,629.59	$9,439.51		$160,069.10
11	310.000-1-15.2	$312,362.50	$344,254.47	$21,571.99		$365,826.46
12	310.000-1-27	$12,498.33	$13,801.28	$865.89		$14,667.17
13	323.000-1-1.3	$8,395.97	$9,012.42	$542.40		$9,554.82
16	323.000-1-2	$8,748.61	$9,389.77	$565.06		$9,954.83
17	323.000-1-1.1	$4,910.70	$5,283.00	$318.45		$5,601.45
19	299.000-1-58.1	$59,217.00	$78,879.90	$7,393.52		$86,273.42
20	322.000-2-19	$3,211.19	$3,464 38	$209.24		$3,673.62
22	322.000-2-28	$2,439.52	$2,638 63	$159.65		$2,798.28
23	284.000-1-30	$56,429.01	$75,563.61	$7,208.10	$82.00	$82,853.71
24	285.000-1-32	$36,333.50	$48,864.25	$4,656.96	$82.00	$53,603.21
25	284.000-1-29	$13,931.19	$19,600.66	$1,904.74	$82.00	$21,587.40
26	285.000-1-2	$45,706.00	$61,354.82	$5,854.22	$82.00	$67,291.04
27	285.000-1-5	$7,544.54	$10,764.27	$1,028.83	$82.00	$11,875.10
28	285.000-1-8.1	$18,275.16	$25,302.91	$2,436.83	$164.00	$27,902.74
29	284.000-1-27	$27,703.71	$38,026.28	$3,669.23	$82.00	$41,777.51
30	284.000-1-28	$15,426.26	$21,295.68	$2,032.71	$82.00	$23,410.39
31	284.000-1-37	$15,318.11	$21,167.47	$2,021.84	$82.00	$23,271.31
32	297.000-1-3.1	$7,048.45	$10,218.81	$978.95	$82.00	$11,279.76
34	310.000-2-1	$29,699.49	$39,854.08	$3,731.46		$43,585.54
35	285.000-1-6	$7,442.40	$10,629.12	$1,015.96	$82.00	$11,727.08
36	284.000-1-18	$9,832.15	$13,768.02	$1,316.29	$82.00	$15,166.31
37	270.000-1-34	$22,625.91	$31,495.67	$3,072.52	$82.00	$34,650.19
38	269.000-2-47.1	$5,111.06	$7,643.57	$732.74	$82.00	$8,458.31
39	310.000-2-6.2	$3,776.93	$5,730.70	$540.18	$82.00	$6,352.88
40	310.000-2-9	$1,973.99	$3,367.42	$319.62	$82.00	$3,769.04
41	299.000-1-1	$26,657.00	$36,032.22	$3,431.05	$82.00	$39,545.27
42	286.000-2-83.6	$16,985.31	$23,257.08	$2,219.26	$82.00	$25,558.34
43	286.003-3-42	$1,745.40	$3,060.76	$291.99	$82.00	$3,434.75
44	299.000-1-57.2	$60,477.34	$72,269.40	$6,743.07		$79,012.47
45	299.000-1-57.3	$3,703.29	$5,716.17	$531.19		$6,247.36
46	299.000-1-58.3	$44,194.32	$59,267.40	$5,647.64	$82.00	$64,997.04
47	310.000-2-6.1	$41,152.31	$54,922.17	$5,131.58	$82.00	$60,135.75
48	284.000-1-23	$54,703.78	$73,155.07	$6,967.47	$82.00	$80,204.54
49	298.000-1-58	$33,473.98	$45,768.47	$4,424.14	$82.00	$50,274.61
50	284.000-1-25.2	$8,844.94	$12,339.33	$1,173.38	$82.00	$13,594.71
51	299.000-1-58.2	$12,376.92	$17,713.42	$1,718.39		$19,431.81
52	283.000-1-5	$49,261.76	$66,244.67	$6,335.80	$82.00	$72,662.47
53	298.000-1-57	$12,356.15	$17,334.88	$1,672.77	$82.00	$19,089.65
54	284.000-1-22	$4,843.82	$7,170.55	$684.79	$82.00	$7,937.34
55	284.000-1-24	$26,728.40	$36,044.20	$3,426.01	$82.00	$39,552.21
56	284.000-1-20	$5,951.08	$8,631.37	$823.47	$82.00	$9,536.84
58	298.000-1-3	$19,615.32	$26,535.34	$2,520.16	$82.00	$29,137.50
59	297.000-1-5.1	$28,261.78	$37,852.31	$3,586.52	$82.00	$41,520.83
59	297.000-1-5.2	$18,136.65	$24,539.66	$2,327.70	$82.00	$26,949.36

Exhibit B
Oneida County
(as of 8/31/07)

Oneida Nation Parcel #	County Tax Map Number	Original Tax + Local Fee	Accrued Taxes (Tax, Fee & Penalties)	Interest	Stub Search & Advertising Fee	Total
60	298.000-1-50.2	$11,335.56	$15,624.89	$1,485.45	$82.00	$17,192.34
61	298.000-1-14	$10,331.35	$14,505.86	$1,397.84	$82.00	$15,985.70
62	298.000-1-50.1	$10,090.56	$14,417.24	$1,410.05	$82.00	$15,909.29
63	298.000-1-56.2	$12,094.01	$16,624.33	$1,580.24	$82.00	$18,286.57
64	298.000-1-50.7	$4,225.08	$6,255.23	$596.83	$82.00	$6,934.06
65	298.000-1-69	$1,602.12	$2,798.86	$269.06	$82.00	$3,149.92
66	298.000-1-41.1	$10,555.56	$14,471.71	$1,349.34	$82.00	$15,903.05
66	298.000-1-41.2	$36,339.35	$48,105.53	$4,471.76	$82.00	$52,659.29
67	310.000-1-61	$2,920.53	$4,423.33	$420.75		$4,844.08
68	298.000-1-43	$21,203.20	$28,532.49	$2,700.97	$82.00	$31,315.46
69	299.001-1-35.1	$7,269.43	$10,237.66	$962.49	$82.00	$11,282.15
70	299.001-1-35.2	$44,505.80	$59,141.35	$5,594.38	$82.00	$64,817.73
71	299.001-1-35.3	$1,322.38	$2,424.58	$233.03	$82.00	$2,739.61
72	298.000-1-42.2	$18,567.52	$24,860.88	$2,304.75	$82.00	$27,247.63
73	298.000-1-42.1	$16,528.72	$22,184.83	$2,057.38	$82.00	$24,324.21
74	299.000-1-56.2	$60,268.38	$79,033.21	$7,311.99	$82.00	$86,427.20
82	322.014-1-23	$72,104.87	$97,028.90	$9,565.58		$106,594.48
83	322.014-1-25	$740.81	$1,453.99	$144.00		$1,597.99
84	322.014-1-26	$740.81	$1,453.99	$144.00		$1,597.99
86	299.000-1-55.2	$5,547.74	$7,791.72	$723.17		$8,514.89
88	299.001-1-36	$14,448.54	$19,339.72	$1,788.24		$21,127.96
89	298.002-3-15.1	$23,978.23	$31,710.19	$2,929.92		$34,640.11
90	284.000-1-21	$9,870.05	$13,527.23	$1,279.13		$14,806.36
91	284.000-1-19	$2,992.51	$4,516.44	$429.36		$4,945.80
92	322.015-2-64	$848.05	$1,741.57	$172.90		$1,914.47
92	322.015-2-65	$14,762.77	$20,545.56	$2,032.30		$22,577.86
93	322.014-1-24	$15,680.25	$21,785.37	$2,154.91		$23,940.28
96	322.015-2-1	$17,120.70	$23,670.35	$2,339.22		$26,009.57
97	252.015-2-31	$32,687.05	$43,257.27	$4,058.70		$47,315.97
99	286.000-2-83.1	$32,839.77	$43,250.38	$4,055.21		$47,305.59
101	299.000-1-27	$17,246.76	$22,965.60	$2,156.74		$25,122.34
102	312.000-1-52.1	$21,611.14	$28,659.46	$2,693.35		$31,352.81
103	297.001-1-8.2	$10,196.66	$13,778.11	$1,293.40		$15,071.51
103	297.001-1-8.1	$1,901.05	$2,978.60	$282.18		$3,260.78
104	312.000-1-65	$99,038.70	$118,543.52	$9,227.23		$127,770.75
105	324.013-1-7	$76,380.24	$99,640.14	$9,300.68		$108,940.82
106	298.000-1-19	$998.74	$1,804.48	$172.39		$1,976.87
107	298.000-1-18	$6,124.27	$8,622.10	$824.71		$9,446.81
108	299.001-1-37	$15,966.44	$21,079.73	$1,933.09		$23,012.82
110	311.000-1-18	$2,549.98	$3,825.95	$362.27		$4,188.22
112	323.012-2-9	$148,981.50	$191,275.63	$17,851.01		$209,126.64
113	322.000-1-30	$8,454.60	$9,094.11	$549.01		$9,643.12
114	299.000-1-2	$20,159.10	$26,671.31	$2,494.76		$29,166.07
115	299.000-1-23.1	$6,535.08	$8,927.62	$830.85		$9,758.47
116	299.000-1-13	$10,514.32	$14,197.38	$1,334.51		$15,531.89
117	311.000-2-6.1	$43,230.82	$55,875.20	$5,093.89		$60,969.09

Exhibit B
Oneida County
(as of 8/31/07)

Oneida Nation Parcel #	County Tax Map Number	Original Tax + Local Fee	Accrued Taxes (Tax, Fee & Penalties)	Interest	Stub Search & Advertising Fee	Total
118	311.000-1-32	$7,679.82	$10,400.62	$956.35		$11,356.97
118	311.000-2-10.1	$36,867.84	$48,007.00	$4,398.03		$52,403.03
118	311.000-2-11	$41,726.54	$54,267.23	$4,968.71		$59,235.94
119	312.000-1-2	$4,795.25	$6,751.15	$636.86		$7,388.01
121	238.000-2-5	$68,243.31	$88,720.41	$8,263.24		$96,983.65
122	297.000-1-15	$22,526.50	$29,847.91	$2,803.03		$32,650.94
123	324.000-1-71	$13,852.21	$18,456.23	$1,727.02		$20,183.25
124	299.000-1-57.1	$18,845.34	$24,654.25	$2,245.52		$26,899.77
125	322.015-2-40.3	$202.73	$775.97	$77.26		$853.23
125	322.015-2-45.1	$124,630.17	$167,947.49	$16,574.78		$184,522.27
125	322.015-2-47	$1,360.36	$2,331.29	$230.75		$2,562.04
137	332.000-1-19.2	$5,929.57	$7,479.65	$595.83		$8,075.48
137	332.000-1-20.1	$38,174.04	$49,928.83	$4,658.04		$54,586.87
137	332.000-1-27	$310.67	$716.49	$68.49		$784.98
138	283.000-1-1.3	$748.23	$1,377.84	$130.94		$1,508.78
139	282.000-1-3	$18,624.75	$24,631.25	$2,298.64		$26,929.89
140	282.000-1-2.2	$2,403.51	$3,617.52	$340.57		$3,958.09
140	283.000-1-77	$3,787.09	$5,409.87	$507.60		$5,917.47
140	283.000-1-1.2	$12,446.33	$16,627.41	$1,552.83		$18,180.24
140	267.000-1-8	$10,251.73	$13,784.47	$1,287.93		$15,072.40
140	282.000-1-1	$23,920.55	$31,491.71	$2,937.87		$34,429.58
140	267.000-1-5	$328.12	$928.91	$90.05		$1,018.96
140	267.000-1-6	$10,824.21	$14,526.05	$1,357.02		$15,883.07
140	267.000-1-7	$20,294.64	$26,794.51	$2,500.20		$29,294.71
142	282.000-1-2.1	$4,765.11	$6,676.78	$625.65		$7,302.43
143	310.000-1-16	$11,990.09	$16,035.35	$1,499.19		$17,534.54
144	298.002-3-15.3	$5,415.92	$7,418.45	$676.41		$8,094.86
144	298.002-3-16	$15,850.68	$20,808.68	$1,895.36		$22,704.04
144	298.002-3-17	$320,507.66	$411,203.35	$37,378.96		$448,582.31
147	297.000-1-37.1	$17,262.53	$22,832.12	$2,129.79		$24,961.91
148	311.000-2-24.1	$15,800.65	$20,748.38	$1,889.99		$22,638.37
148	311.000-2-24.12	$559.66	$721.29	$56.26		$777.55
148	311.000-2-24.6	$2,076.61	$3,164.74	$292.27		$3,457.01
148	311.000-2-24.7	$2,762.81	$4,043.93	$372.15		$4,416.08
149	310.000-1-7	$23,468.49	$30,904.02	$2,886.09		$33,790.11
154	311.000-2-26	$87,091.88	$112,086.59	$10,188.97		$122,275.56
156	298.000-1-56.1	$18,615.01	$24,607.90	$2,297.98		$26,905.88
157	298.000-1-50.3	$2,782.71	$4,108.48	$386.68		$4,495.16
158	312.000-1-62.2	$18,084.87	$23,443.32	$2,162.96		$25,606.28
164	299.000-1-26	$14,982.66	$19,712.29	$1,830.62		$21,542.91
165	310.000-2-13	$12,269.63	$16,228.57	$1,473.64		$17,702.21
170	324.000-1-70	$1,134.00	$1,877.27	$177.72		$2,054.99
172	361.000-1-8	$52,077.33	$67,646.77	$6,277.38		$73,924.15
172	361.000-1-1.2	$25,278.63	$33,086.90	$3,075.61		$36,162.51
175	324.013-1-18	$29,722.31	$38,727.61	$3,591.84		$42,319.45
176	297.000-1-23	$12,971.86	$17,166.83	$1,599.69		$18,766.72

Exhibit B
Oneida County
(as of 8/31/07)

Oneida Nation Parcel #	County Tax Map Number	Original Tax + Local Fee	Accrued Taxes (Tax, Fee & Penalties)	Interest	Stub Search & Advertising Fee	Total
176	297.000-1-16	$1,368.54	$2,179.46	$205.67		$2,385.13
176	297.000-1-17	$3,270.00	$4,633.77	$433.72		$5,067.49
177	310.000-1-23	$1,923.57	$2,895.77	$272.00		$3,167.77
177	310.000-1-24	$2,559.42	$3,716.87	$348.26		$4,065.13
177	310.000-1-22	$2,604.80	$3,775.47	$353.71		$4,129.18
179	310.000-2-8	$24,882.05	$30,791.09	$2,790.72		$33,581.81
180	298.002-3-22	$11,130.13	$14,761.43	$1,371.97		$16,133.40
181	310.000-2-4	$959,798.44	$1,062,763.83	$67,551.02		$1,130,314.85
182	310.000-2-3.2	$3,103.74	$4,375.24	$400.77		$4,776.01
183	323.012-1-39	$26,697.67	$34,828.47	$3,230.52		$38,058.99
183	323.008-1-1.1	$2,716.59	$3,913.84	$365.76		$4,279.60
184	323.000-1-34.3	$2,595.91	$3,766.50	$353.67		$4,120.17
184	323.000-1-34.5	$14,291.56	$18,881.00	$1,761.29		$20,642.29
186	298.000-1-50.11	$3,891.69	$5,402.44	$502.10		$5,904.54
186	298.000-1-51	$27,124.03	$35,194.36	$3,253.22		$38,447.58
187	310.000-1-6	$2,577.69	$3,717.69	$346.52		$4,064.21
188	310.000-2-5	$13,783.21	$17,874.82	$1,609.35		$19,484.17
189	299.000-1-31.2	$15,857.73	$20,707.96	$1,910.84		$22,618.80
190	299.000-1-25	$9,129.71	$12,060.72	$1,110.00		$13,170.72
190	299.000-1-31.1	$79,205.89	$69,707.19	$6,433.34		$76,140.53
192	310.000-2-3.1	$13,960.49	$18,124.98	$1,631.79		$19,756.77
193	298.002-3-4.3	$20,454.42	$26,457.76	$2,436.74		$28,894.50
194	285.000-1-31	$8,117.80	$10,821.76	$1,002.55		$11,824.31
197	310.000-2-2	$20,914.61	$26,943.36	$2,423.00		$29,366.36
199	284.000-1-26	$6,548.36	$8,808.05	$816.34		$9,624.39
201	312.000-1-1	$16,930.59	$22,134.80	$2,050.04		$24,184.84
202	310.000-2-7	$2,777.94	$3,934.79	$357.40		$4,292.19
203	298.002-2-2	$788.07	$1,405.94	$130.83		$1,536.77
203	298.002-2-1	$450.70	$972.66	$90.76		$1,063.42
205	239.000-2-31	$11,985.24	$15,778.80	$1,460.28	$82.00	$17,321.08
206	268.000-1-31	$31,370.19	$40,625.54	$3,752.78		$44,378.32
206	268.000-1-19	$2,046.32	$3,035.66	$283.46		$3,319.12
220	270.000-1-23	$3,328.73	$4,571.65	$423.11		$4,994.76
221	270.000-1-33.3	$17,958.19	$23,091.48	$2,110.54		$25,202.02
222	270.000-1-35.5	$5,917.82	$7,874.24	$726.32		$8,600.56
223	285.000-1-9	$4,461.58	$6,018.63	$556.21		$6,574.84
224	285.000-1-10	$202.81	$578.88	$55.86		$634.74
225	285.000-1-11	$4,000.07	$5,429.16	$501.96		$5,931.12
228	271.000-3-65.1	$26,238.02	$33,833.89	$3,114.62		$36,948.51
230	297.000-1-37.2	$28,625.29	$36,837.50	$3,385.94		$40,223.44
232	252.015-2-46	$56,697.03	$72,771.47	$6,674.01		$79,445.48
233	299.000-1-50	$16,993.84	$20,116.88	$1,835.30		$21,951.98
234	310.000-3-48.1	$37,312.73	$47,419.43	$4,311.93		$51,731.36
235	283.000-1-3	$10,075.84	$13,079.52	$1,193.61		$14,273.13
238	299.000-1-53	$14,347.43	$18,482.01	$1,686.67		$20,168.68
239	283.000-1-7.1	$27,463.73	$35,079.21	$3,198.58		$38,277.79

Exhibit B
Oneida County
(as of 8/31/07)

Oneida Nation Parcel #	County Tax Map Number	Original Tax + Local Fee	Accrued Taxes (Tax, Fee & Penalties)	Interest	Stub Search & Advertising Fee	Total
239	283.000-1-6	$6,152.57	$8,106.94	$741.44		$8,848.38
239	283.000-1-59.1	$7,986.40	$10,427.92	$952.88		$11,380.80
239	283.000-1-62	$3,689.74	$4,992.47	$457.42		$5,449.89
240	324.000-1-7.1	$202,776.22	$224,159.47	$14,183.51		$238,342.98
242	310.000-1-8	$12,441.09	$16,085.55	$1,466.74		$17,532.29
244	312.000-1-62.1	$21,536.60	$27,588.57	$2,520.24		$30,108.81
244	312.000-1-63.1	$892.11	$1,449.53	$135.14		$1,584.67
247	298.000-1-17	$11,534.85	$14,773.36	$1,341.39		$16,114.75
248	298.002-3-23	$12,630.94	$15,989.71	$1,406.98		$17,396.69
251	283.000-1-1.1	$11,916.83	$15,254.96	$1,382.91		$16,637.87
252	298.000-1-20	$7,286.72	$9,424.15	$856.55		$10,280.70
253	298.000-1-15	$14,871.37	$18,974.70	$1,722.18		$20,696.88
254	299.000-1-52	$9,447.10	$11,988.78	$1,073.66		$13,062.44
256	252.011-2-2	$57,694.34	$71,399.82	$6,314.15		$77,713.97
256	252.012-1-1	$59,694.61	$74,218.87	$6,583.54		$80,802.41
256	252.015-2-30	$11,294.42	$14,194.06	$1,257.35		$15,451.41
257	299.001-1-48.2	$117,299.56	$143,982.02	$12,673.93		$156,655.95
259	297.000-1-2	$43,490.90	$54,310.32	$4,849.59		$59,159.91
259	297.001-1-5.2	$1,667.30	$2,321.48	$209.92		$2,531.40
260	299.000-1-45	$12,354.56	$15,600.59	$1,396.38		$16,996.97
261	310.000-2-16	$6,207.75	$7,890.20	$685.11		$8,575.31
262	310.000-2-26.2	$11,454.03	$14,423.29	$1,286.18		$15,709.47
263	310.000-2-26.1	$10,983.92	$13,650.07	$1,168.00		$14,818.07
263	310.000-2-28	$23,940.78	$29,685.81	$2,563.92		$32,249.73
264	271.000-3-58	$41,313.81	$51,568.47	$4,610.85		$56,179.32
265	371.000-2-32.1	$4,615.25	$6,000.81	$538.66		$6,539.47
265	371.000-2-31	$10,445.97	$13,267.53	$1,187.88		$14,455.21
266	299.000-1-46	$9,361.68	$11,874.66	$1,060.34		$12,935.00
267	310.000-2-15.1	$13,068.97	$16,326.51	$1,412.74		$17,739.25
268	298.000-1-12	$30,532.43	$38,177.82	$3,413.79		$41,591.61
268	298.000-1-13.2	$800.36	$1,239.51	$113.11		$1,352.62
268	298.000-1-13.1	$785.02	$1,220.60	$111.43		$1,332.03
268	285.000-1-21	$596.75	$990.26	$91.19		$1,081.45
268	285.000-1-22	$5,209.73	$6,720.74	$603.19		$7,323.93
269	310.000-2-18	$7,342.59	$9,155.00	$785.56		$9,940.58
270	310.000-2-27	$227.33	$463.95	$42.44		$506.39
271	299.000-1-5	$12,491.35	$15,600.11	$1,384.14		$16,984.25
272	311 000-1-14.2	$55,477.02	$62,531.36	$4,291.84		$66,823.20
273	310.000-2-24	$1,513.30	$2,034.41	$176.68		$2,211.09
273	310.000-3-52	$13,376.80	$16,522.96	$1,415.06		$17,938.02
274 & 285	310.000-3-53.3	$17,117.64	$20,335.71	$1,660.44		$21,996.15
275	311.000-2-25.2	$9,656.56	$12,339.53	$1,085.21		$13,434.74
276	311.000-2-24.14	$1,847.83	$2,439.68	$210.76		$2,650.44
277	310.000-2-17	$8,791.56	$10,924.60	$936.82		$11,861.42
278	311.000-2-21.2	$10,183.27	$12,445.44	$1,028.51		$13,473.95

Exhibit B
Oneida County
(as of 8/31/07)

Oneida Nation Parcel #	County Tax Map Number	Original Tax + Local Fee	Accrued Taxes (Tax, Fee & Penalties)	Interest	Stub Search & Advertising Fee	Total
278	311.000-2-21.8	$1,821.20	$2,410.44	$208.81		$2,619.25
279	299.000-1-22.1	$22,892.32	$28,270.29	$2,492.96		$30,763.25
280	310.000-2-14	$18,240.11	$22,354.24	$1,901.11		$24,255.35
281	322.014-1-22	$4,185.81	$5,510.28	$533.88		$6,044.16
284	299.000-1-49	$11,467.77	$14,095.71	$1,227.70		$15,323.41
286	285.000-1-24	$8,420.27	$10,342.86	$897.04		$11,239.90
287	310.000-2-15.2	$9,048.86	$11,028.75	$921.53		$11,950.28
292	298.000-1-59.1	$6,851.39	$8,452.93	$734.06		$9,186.99
293	297.000-1-27.1	$1,206.47	$1,556.72	$134.21		$1,690.93
294	297.000-1-27.3	$1,506.08	$1,912.63	$164.46		$2,077.09
294	297.000-1-27.4	$1,268.39	$1,627.89	$140.25		$1,768.14
295	299.000-1-21	$4,872.39	$5,909.69	$503.82		$6,413.51
296	298.000-1-34.1	$6,493.81	$7,835.17	$667.34		$8,502.51
297	322.000-1-67.1	$2,498.26	$3,089.38	$264.19		$3,353.57
298 & 312	311.000-1-13	$11,910.03	$13,979.42	$1,088.13		$15,067.55
300	297.000-1-12.1	$5,761.16	$6,965.12	$593.45		$7,558.57
301	298.000-1-16	$5,893.27	$7,122.01	$606.77		$7,728.78
302	299.001-1-48.1	$34,040.00	$40,381.04	$3,393.14		$43,774.18
303	298.000-1-34.2	$6,289.65	$7,592.73	$646.75		$8,239.48
305	252.015-2-34	$2,891.64	$3,386.85	$248.81		$3,635.66
305	252.015-2-35	$68,548.55	$75,012.89	$4,832.12		$79,845.01
306	300.000-3-7.3	$3,392.42	$3,986.57	$312.58		$4,299.15
308	252.015-2-47	$6,896.59	$8,202.68	$665.92		$8,868.60
309	283.000-1-2	$6,136.17	$7,289.08	$591.80		$7,880.88
313	252.012-1-2	$7,188.84	$8,543.87	$693.43		$9,237.30
316	324.000-1-75.4	$1,307.29	$1,647.86	$135.68		$1,783.54
316	324.000-1-75.2	$7,868.07	$9,310.53	$758.46		$10,068.99
318	252.015-2-48.1	$5,979.53	$7,132.03	$579.58		$7,711.61
319	371.000-2-30	$421.59	$563.72	$45.77		$609.49
319	371.000-2-33	$4,958.73	$5,814.59	$456.10		$6,270.69
320	310.000-2-12	$6,262.19	$7,210.21	$520.39		$7,730.60
321	284.000-1-32	$1,155.57	$1,410.41	$112.24		$1,522.65
323	298.000-1-33	$3,368.52	$3,806.73	$262.35		$4,069.08
324	252.015-2-36	$2,851.25	$3,363.37	$259.84		$3,623.21
325	253.000-1-17.1	$2,142.68	$2,448.49	$169.54		$2,618.03
325	237.000-3-6	$752.62	$909.41	$64.57		$973.98
325	254.000-1-2.1	$4,133.70	$4,652.96	$319.91		$4,972.87
326	252.007-3-32.2	$46,281.02	$52,647.99	$3,834.36		$56,482.35
326	252.007-3-32.267	$4,448.04	$609.29	$52.21		$661.50
326	252.007-3-32.269	$501.68	$685.04	$54.76		$719.80
326	252.007-3-32.270	$289.83	$430.72	$39.86		$470.58
326	252.007-3-29	$3,146.54	$3,568.65	$243.91		$3,812.56
326	252.007-3-30	$1,052.87	$1,244.92	$86.90		$1,331.82
327	252.012-1-24	$2,315.35	$2,549.32	$158.21		$2,707.53
328	323.000-1-40	$3,981.25	$4,288.35	$258.72		$4,547.07
328	323.000-1-45	$2,039.51	$2,210.56	$133.94		$2,344.50

Exhibit B
Oneida County
(as of 8/31/07)

Oneida Nation Parcel #	County Tax Map Number	Original Tax + Local Fee	Accrued Taxes (Tax, Fee & Penalties)	Interest	Stub Search & Advertising Fee	Total
331	288.003-3-47	$7,933.37	$8,587.62	$523.21		$9,110.83
331	286.003-3-44	$6,140.69	$6,648.68	$404.92		$7,053.60
332	284.000-1-17	$611.75	$684.76	$42.51		$727.29
333	298.000-1-35	$3,677.77	$3,965.27	$239.46		$4,204.73
		$6,631,788.95	$8,209,137.54	$691,010.92	$4,018.00	$8,904,166.46

Citizens Bank

International Division
20 Cabot Road
Medford, MA 02155 USA
888 868.0212 tel
SWIFT: CTZIUS33 TELEX 211047 CTZINTL

IRREVOCABLE STANDBY LETTER OF CREDIT NUMBER S906035

ISSUING BANK:
RBS CITIZENS, N.A.
INTERNATIONAL TRADE DEPT.
20 CABOT ROAD, M/S MMP470
MEDFORD, MA 02155 U.S.A.

PLACE AND DATE OF ISSUE:
MEDFORD, MA
JUNE 17, 2008

PLACE AND DATE OF EXPIRY:
AT OUR COUNTERS
SEPTEMBER 30, 2009

BENEFICIARY:
ONEIDA COUNTY
COMMISSIONER OF FINANCE
800 PARK AVENUE
UTICA, NEW YORK 13501

APPLICANT:
ONEIDA INDIAN NATION
223 GENESEE ST
ONEIDA, NY 13421

UP TO AN AGGREGATE AMOUNT THEREOF: USD 3,123,141.38

PARTIAL DRAWINGS: PERMITTED

CREDIT AVAILABLE WITH:
RBS CITIZENS, N.A.
INTERNATIONAL TRADE DEPT.
20 CABOT ROAD, M/S MMP470
MEDFORD, MA 02155 U.S.A.

AGAINST PRESENTATION OF DOCUMENTS AS DETAILED HEREIN.

WE HEREBY ESTABLISH OUR IRREVOCABLE STANDBY LETTER OF CREDIT NO.S906035 IN YOUR FAVOR FOR THE ACCOUNT OF ONEIDA INDIAN NATION UP TO THE AGGREGATE AMOUNT OF THREE MILLION ONE HUNDRED TWENTY THREE THOUSAND ONE HUNDRED FORTY ONE AND 38/100 U.S. DOLLARS (USD 3,123,141.38) EFFECTIVE IMMEDIATELY. THIS LETTER OF CREDIT IS AVAILABLE BY PRESENTATION OF DOCUMENTS DETAILED HEREIN.

1) THE ORIGINAL LETTER OF CREDIT AND ALL AMENDMENTS THERETO, IF ANY FOR OUR ENDORSEMENT OF ANY PAYMENTS EFFECTED BY US; AND

2) SATISFACTION OF THE CONDITIONS SET FORTH IN EXHIBIT A, AS

CONTINUED ON NEXT PAGE

Citizens Bank

International Division
20 Cabot Road
Medford, MA 02155 USA
888 868.0212 tel
SWIFT: CTZIUS33 TELEX 211047 CTZINTL

CONFIRMED BY AN OPINION LETTER ISSUED BY AN INDEPENDENT COUNSEL THAT DOES NOT REPRESENT EITHER THE APPLICANT OR THE BENEFICIARY.

IT IS A CONDITION OF THIS LETTER OF CREDIT THAT IT SHALL BE DEEMED AUTOMATICALLY EXTENDED WITHOUT AMENDMENT FOR ONE YEAR FROM ITS EXPIRY DATE, OR FROM ANY FUTURE EXPIRY DATE, UNLESS AT LEAST THIRTY (30) DAYS PRIOR TO ANY SUCH EXPIRY DATE, WE SHALL NOTIFY YOU BY WRITTEN NOTICE SENT BY REGISTERED MAIL OR OVERNIGHT COURIER, THAT WE ELECT NOT TO CONSIDER THIS LETTER OF CREDIT EXTENDED FOR ANY SUCH ADDITIONAL PERIOD.

WE HEREBY ENGAGE WITH YOU THAT ALL DRAFT(S) ACCOMPANIED BY DOCUMENTS DRAWN UNDER AND IN COMPLIANCE WITH THE TERMS OF THIS CREDIT WILL BE DULY HONORED UPON PRESENTATION TO OUR OFFICE AT 20 CABOT ROAD, MAIL STOP: MMP470, MEDFORD, MA 02155 USA ON OR BEFORE THE CURRENT OR ANY FUTURE EXPIRY DATE

EXCEPT AS OTHERWISE EXPRESSLY STATED HEREIN, THIS CREDIT IS SUBJECT TO INTERNATIONAL STANDBY PRACTICES (ISP98) INTERNATIONAL CHAMBER OF COMMERCE PUBLICATION NO. 590.

PLEASE ADDRESS ANY INQUIRIES OR CORRESPONDENCE TO ATTN: JOH REED, INTERNATIONAL DEPT., QUOTING OUR REFERENCE NO: S906035
BY PHONE: (781) 655-4376, BY FAX: (781) 391-8701
BY SWIFT: CTZIUS33, BY TELEX: 211047 CTZINTL

AUTHORIZED SIGNATURE AUTHORIZED SIGNATURE

RBS

Exhibit A

As used herein, "the federal litigation" means litigation, including appellate review as of right or by petition for writs of certiorari, in *Oneida Indian Nation of New York v. Oneida County*, No. 05-CV-945 (N.D.N.Y.).

As used herein, "the state litigation" means litigation, including appellate review as of right or permissively or discretionarily or by petitions for writs of certiorari, in *Oneida Indian Nation of New York v. Town of Vernon, et al.*, Nos. 05-740, 741, 751, 759, 738, 761, & 760 (Supreme Court, Oneida County).

As used herein, "the Triggering Event" shall be the earlier of: (i) a demand by the Oneida Nation of New York that payment be made under the accompanying letter of credit to Oneida County in an amount equal to (and not greater than) the amount shown as Total for the property listed in accompanying Exhibit B, or (ii) a final, unreviewable judgment in either the federal litigation or in the state litigation determining that the property listed in the accompanying Exhibit B is not subject to a tax exemption *and* determination in either the federal litigation or the state litigation of the proper level of tax assessment for that property (unless the Nation chooses not to challenge the level of tax assessment).

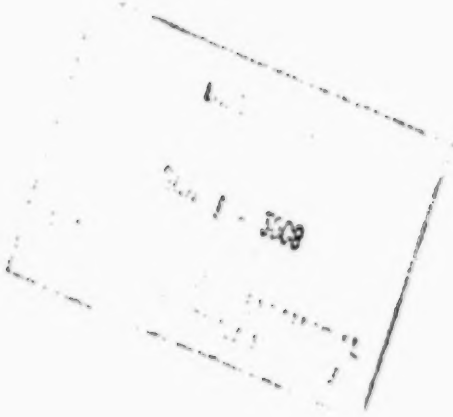
Upon the Triggering Event, payment shall be made under the accompanying letter of credit to Oneida County in an amount equal to (and not greater than) all taxes shown as principal in Exhibit B; provided, however, that payment shall be no more than required by the proper level of tax assessment determined in either the federal litigation or the state litigation, which assessment level shall apply to all years in issue. The amount to be paid shall be confirmed in an opinion letter issued by an independent counsel.

Payment under the foregoing provisions shall be reduced to the extent that there is agreement between the Oneida Nation of New York and Oneida County, New York, which agreement shall be reflected in a writing signed by the affected parties, and to the extent that the Nation has made any payment to Oneida County with respect to bills for taxes, penalties or interest.

Notwithstanding any of the foregoing, no payment will be made as to any taxes, or any interest or penalties in relation to taxes, imposed or accrued after the actual transfer of property listed in Exhibit B to the United States to be held in trust.

Exhibit B
Oneida County
(as of 8/31/07)

Oneida Nation Parcel #	County Tax Map Number	Principal	Fee	Penalties	Interest	Total
10 & 109	298.000-1-39	$2,473,850.49	$196.11	$122,563.38	$526,531.40	$3,123,141.38



PETITIONER'S BRIEF

10 No. 10-72

Supreme Court, U.S.
FILED
DEC 3 - 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MADISON COUNTY and
ONEIDA COUNTY, NEW YORK

Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK,

Respondent,

STOCKBRIDGE-MUNSEE COMMUNITY,
BAND OF MOHICAN INDIANS,

Putative Intervenor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

In *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 (2005) ("*Sherrill*") this Court held that standards of federal Indian law and federal equity practice precluded the Oneida Indian Nation of New York ("OIN"), the same tribe here, from unilaterally reviving its ancient sovereignty, in whole or in part, over recently-purchased property that had been owned and governed by non-Indians for 200 years. In so holding, this Court expressly rejected the tribe's claim that its sovereign immunity prevented the City of Sherrill in Oneida County, New York, from collecting unpaid property taxes through foreclosure and eviction. Despite *Sherrill*, in these two related cases involving attempts by Madison County and Oneida County to foreclose on OIN-owned fee parcels for nonpayment of lawfully imposed taxes, the lower court held that the remedy of foreclosure is barred by tribal sovereign immunity from suit—a decision which two court of appeals judges expressly (and the third, in effect) implored this Court to review.

The questions presented in this case are:

1. whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed property taxes.*

2. whether the ancient Oneida reservation in New York has been disestablished or diminished.

---

* On November 30, 2010, just before this brief was due and ten years into this litigation, Petitioners' counsel received a letter advising that OIN has purported to "waive" its sovereign immunity from suit as to real property taxes. Petitioners' counsel responded to that letter on December 1, 2010. The parties also submitted letters on December 2, 2010.

PARTIES TO THE PROCEEDING

Petitioners are Madison County and Oneida County, New York. Respondent is the Oneida Indian Nation of New York. The Stockbridge-Munsee Community, Band of Mohican Indians is denominated a putative intervenor. The State of New York appeared as amicus curiae in the Second Circuit in support of the Counties. The United States appeared as amicus curiae in the Second Circuit at the request of the court.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 605 F.3d 149 (2d Cir. 2010), and appears in the Petitioners' Appendix ("Pet. App.") 1a to 33a. The two opinions of the district court, separately addressing the proceedings against Madison County and Oneida County, are reported at 401 F. Supp. 2d 219 (N.D.N.Y. 2005) and 432 F. Supp. 2d 285 (N.D.N.Y. 2006), respectively. Those opinions appear at Pet. App. 52a to 78a (Madison County) and Pet. App. 34a to 51a (Oneida County).

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1362. The court of appeals had jurisdiction under 28 U.S.C. § 1291. The judgment of the court of appeals was entered April 27, 2010. Pet. App. 1a. The Petition for a writ of certiorari was filed July 9, 2010, and granted October 12, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

A. Tribal Immunity As Bar To Foreclosure

The court of appeals viewed this Court's precedents as creating a rule of law that "defies common sense," namely, that "[a]n Indian tribe can purchase land (including land that was never part of a reservation); refuse to pay lawfully-owed taxes; and suffer no consequences because the taxing authority cannot sue to collect the taxes owed." Pet. App. at 32a (Cabranes

and Hall, J.J., concurring); *see also id.* at 21a (equating self-contradictory rule adopted by court to a nonsensical nursery rhyme).[1] Applying that concededly illogical rule to the tax foreclosure proceedings commenced by the Petitioner Counties, the court of appeals affirmed injunctions preventing the Counties from foreclosing on recently-purchased parcels owned in fee by the Oneida Indian Nation of New York ("OIN"). It did so despite OIN's persistent refusal—in direct defiance of this Court's holding in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 (2005) ("*Sherrill*")—to pay lawfully imposed property taxes.

A proper reading of this Court's decisions regarding Indian sovereignty and taxation supports a different and logical rule: taxing authorities that are empowered to assess and collect ad valorem property taxes on fee lands owned by an Indian tribe have the right to collect those taxes through foreclosure. Indeed, this Court's decision in *Sherrill* dictates that Madison and Oneida Counties have the right to foreclose on OIN-owned property for non-payment of property taxes, just as this Court concluded with respect to the City of Sherrill in Oneida County. No basis exists to distinguish the holding in *Sherrill*, where this Court upheld the right of the City to:

(1) impose ad valorem property taxes on OIN lands held in fee;

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1. Mother, may I go out to swim?
Yes, my darling daughter;
Hang your clothes on a hickory limb,
And don't go near the water.

(2) take title to those parcels through foreclosure for non-payment of the property taxes; and

(3) evict OIN after taking legal title to the property.

See 544 U.S. at 211, 214 n.7.

Here, the district court's twin injunctions, affirmed by the court of appeals, prevent either county from collecting delinquent property taxes through foreclosure, despite the holding in *Sherrill*.

The court of appeals' reading of *Sherrill* ignores: (1) the procedural posture of the tax collection and eviction proceedings in that case; (2) that OIN asserted tribal immunity from suit as a defense to the foreclosure and eviction proceedings; and (3) that this Court rejected any and all assertions of tribal sovereignty as a bar to the City of Sherrill's assessment and collection of property taxes. Specifically, in its opinion in *Sherrill*, this Court directly rejected Justice Stevens' lone dissenting view that tribal sovereignty prevents taxing authorities from collecting property taxes through foreclosure and eviction. *See id.* at 214 n.7.

The court of appeals' conclusion that the Counties are powerless to collect real property taxes owed by OIN rests on two fundamental legal misconceptions. The first involves the nature of the remedy of foreclosure. The second involves the nature of tribal sovereignty.

1. Limited Nature Of *In Rem* Foreclosure

Foreclosure is an *in rem* proceeding that culminates in a forced sale of the property (the *res*) to satisfy the

tax obligation. It is not a proceeding against the delinquent taxpayer and thus does not fall within any sovereign immunity prohibition concerning *in personam* lawsuits. This Court specifically drew a distinction between *in rem* and *in personam* proceedings in analyzing a claim of tribal immunity from suit in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) ("*Yakima*"). There, this Court upheld Yakima County's right to assess and collect ad valorem property taxes on lands owned by the Yakima Nation or individual members of that tribe, noting that *in rem* tax collection proceedings are not significantly disruptive of tribal self-government. *See id.* at 265.

2. Limited Nature Of Tribal Sovereign Immunity

Tribes are "quasi-sovereigns" or "semi-sovereigns." The sovereign power that tribes do possess is "of a unique and limited character," *United States v. Wheeler*, 435 U.S. 313, 323 (1978), in keeping with their status as "domestic dependent nations," *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Tribes do not possess the full territorial sovereignty of States or foreign countries even on Indian reservations. *See Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890-91 (1986). And even as to internal tribal affairs, where tribes exercise their maximum sovereign authority over their members and their sovereign territory, tribal sovereignty is subject to total defeasance by Congress. *See Wheeler*, 435 U.S. at 323.

Even if tribes retain some element of tribal immunity from lawsuits, tribes do not enjoy greater immunity from suit than foreign countries or the fifty States. If a State chooses to purchase land located in another State, it is treated as a private citizen subject to the other State's jurisdiction, including laws respecting the assessment and collection of real property taxes. The same holds true for foreign nations. Except for real estate used for official consular purposes, every foreign nation that buys fee land in a State is treated as a private citizen and its land is subject to state and local taxing and regulatory jurisdiction. There is no basis in law or logic to endow OIN and other tribes with "super-sovereign" authority to bar the remedy of foreclosure that would be available against any other sovereign. *Okla. Tax Comm'n. v. Chickasaw Nation*, 515 U.S. 450, 466 (1995); *see also Rice v. Rehner*, 463 U.S. 713, 734 (1983).

3. Misapplication Of *In Personam* Jurisdiction Cases

In determining that tribal immunity from suit bars *in rem* foreclosure, the court of appeals (and district court) relied on two tribal sovereign immunity cases—*Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998) ("*Kiowa*") and *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991) ("*Potawatomi*")—that addressed *in personam* actions. These cases are inapposite inasmuch as they address direct actions against a tribe. Neither decision speaks to the assessment or collection of lawfully-imposed real property taxes on tribally-owned parcels held in fee. Neither conferred super-sovereign authority on a tribe

to interfere with the taxing or regulatory authority of another sovereign with respect to lands located in *that* sovereign's territory. In contrast, both *Sherrill* and *Yakima* directly addressed the assessment and collection of ad valorem property taxes on lands held in fee, located within the taxing and regulatory jurisdiction of a state. Both decisions expressly authorize the local taxing authority to collect taxes through *in rem* foreclosure.

B. Disestablishment / Diminishment Of Former Reservation

This Court in *Sherrill* upheld the right of the City of Sherrill to assess and collect real property taxes without deciding if the Oneidas'[2] ancient reservation had been disestablished or diminished. The Oneidas' former reservation in New York has not physically existed in any meaningful way since the mid-1800s, with small fragments reduced to thirty-two acres by the late nineteenth century. This thirty-two acre remnant is sometimes referred to as the "Oneida territory." The land within the historic reservation's borders has been governed and taxed for generations by New York State and local governments. The record in *Sherrill* showed the claimed reservation area is distinctly non-Indian in character, having been developed by non-Indians in every way imaginable since the mid-nineteenth century. This Court in *Sherrill* referred to the Oneida reservation only in the past tense, using the adjectives "former," "ancient" and "historic." OIN continues to insist,

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2. "OIN" refers to the Respondent, the present-day Oneida Indian Nation of New York. "Oneidas" refers to the ancient or historic Oneida Nation.

however, that a "not disestablished" physically non-existent 300,000-acre reservation in central New York still exists, a contention that cannot be reconciled with the historical realities detailed in *Sherrill*.

In the judicial proceedings below, OIN has argued that the existence of the "not disestablished" reservation:

- renders the area Indian Country within the meaning of 18 U.S.C. § 1151;
- subjects its fee lands to the restrictions of the Indian Trade and Intercourse Act; and
- makes the area an Indian reservation, which triggers state-law tax exemptions for lands not recognized as an Indian reservation by New York for 150 years or more.

Each of these legal contentions, if sustained, would produce the highly disruptive effects that this Court sought to avoid in *Sherrill*.

STATEMENT OF THE CASE

A. This Court's Decision In *Sherrill*

In *Sherrill*, this Court rejected OIN's "unification theory" and claim of "present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations." 544 U.S. at 214. This Court held that "the Tribe cannot

unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue." *Id.* at 203. OIN had "refused to pay the assessed property taxes . . . [and] [t]he city of Sherrill initiated eviction proceedings in state court." *Id.* at 211.[3] OIN sued in federal district court and sought a broad injunction premised on OIN's sovereignty over the land and its sovereign immunity from suit. *Oneida Indian Nation of New York v. City of Sherrill*, 337 F3d 139, 144 (2d Cir. 2003). Specifically, OIN requested an injunction that would forbid the City of Sherrill as taxing authority from: (1) imposing real property taxes on OIN-owned properties, (2) pursuing any remedies to collect taxes that were due, or (3) evicting OIN after taking title to the property for nonpayment of taxes. Joint Appendix ("JA") 164a.

OIN specifically asserted as an affirmative defense to the eviction action its tribal sovereign immunity from suit. JA125a. OIN also asserted tribal sovereign immunity from suit in its complaint seeking injunctive and declaratory relief preventing tax collection through foreclosure and eviction. JA162a . *See Oneida Indian Nation of New York v. City of Sherrill*, 145 F.Supp.2d 226, 238 (N.D.N.Y. 2001); *Sherrill*, 337 F3d at 145-46, 169.

This Court in *Sherrill* rejected every aspect of OIN's claimed sovereign immunity from taxation and tax

3. Prior to commencing the eviction action, the City of Sherrill had obtained title to the parcels through the City's administrative foreclosure procedures, as detailed in the district court's opinion in that case. *See Oneida Indian Nation of New York v. City of Sherrill*, 145 F. Supp. 2d 226, 232-33 (N.D.N.Y. 2001).

enforcement, and fully endorsed the City of Sherrill's authority to foreclose and evict for nonpayment of taxes. 544 U.S. at 214. The decision specifically addressed whether tribal immunity could be raised either offensively or defensively by OIN to prevent the loss of its lands through foreclosure and eviction. Justice Stevens, in dissent, decried the Court's decision, believing it "effectively proclaimed a diminishment of the Tribe's reservation and an abrogation of its elemental right to tax immunity." *Id.* at 225; *see also id.* at 226. Justice Stevens specifically suggested that the tribe could raise sovereign immunity "as a *defense* against a state collection proceeding." *Id.* at 225 (emphasis in original); *see also id.* at 225-26. This Court expressly rejected that suggestion:

> The dissent suggests that, compatibly with today's decision, the Tribe may assert tax immunity defensively in the eviction proceeding initiated by Sherrill. We disagree. The equitable cast of the relief sought remains the same whether asserted affirmatively or defensively.

Id. at 214, n.7 (internal citation omitted).

This Court made clear in *Sherrill* that "to reestablish sovereign authority over territory last held by the Oneidas 200 years ago," OIN would have to apply to have its lands taken into trust. *Id.* at 220-21. The lands would be exempt from state and local taxation only after they were in trust status.

B. Developments Post-*Sherrill*

Within days of this Court's ruling in *Sherrill*, OIN asked the Secretary of the Interior to take into trust all 17,370 checkerboarded acres of fee lands it owned in the Counties. JA254a.[4] At the same time, and continuing to the present, OIN has persisted in its refusal to pay delinquent property taxes on hundreds of recently-purchased properties that, like those in *Sherrill*, had been owned and governed by non-Indians for approximately 200 years and subject to state and local taxation for generations. In the face of OIN's continued refusal to pay the accrued taxes, the Counties resumed their foreclosure proceedings by employing their respective *in rem* procedures under New York law.[5]

OIN sought to enjoin both Counties from proceeding with foreclosure. The district court on October 27, 2005

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4. The Secretary ultimately decided to take approximately 13,000 acres into trust in a Record of Decision dated May 20, 2008 ("ROD"). JA246-312a. That decision is the subject of litigation pending in the Northern District of New York. *See, e.g., New York v. Salazar*, No. 08-cv-644 (N.D.N.Y., filed June 19, 2008). None of the parcels has been taken into trust.

5. Madison County's procedure requires a foreclosure action in state court after the redemption period has expired, while Oneida County employs a non-judicial administrative foreclosure proceeding by which the County takes title pursuant to a tax sale. Pet. App. at 8a-10a. In this regard, Oneida County's procedure is similar to the City of Sherrill's procedure as described by the district court (145 F. Supp. 2d at 232-33) and upheld by this Court in *Sherrill*. The last step in the City of Sherrill's procedure was eviction, which this Court noted. *See Sherrill*, 544 U.S. at 211.

granted summary judgment to OIN on four separate grounds, permanently enjoining Madison County from foreclosing (Pet. App. at 76a), stating, "unless directed otherwise by legislation or judicial mandate, the seizure of land from a sovereign, against its will, will not occur as a result of a ruling from this forum." *Id.* at 77a. The district court on June 2, 2006 granted OIN's motion for summary judgment on the same grounds, permanently enjoining Oneida County from foreclosing. *Id.* at 48a-50a.

C. Court of Appeals' Reading Of *Sherrill* And Other Cases Regarding Tribal Sovereignty

On April 27, 2010, the court of appeals affirmed the district court's orders on the single ground that "the foreclosure actions are barred by the OIN's sovereign immunity from suit." Pet. App. at 23a. The court of appeals declined to "read *Sherrill* as implicitly abrogating the OIN's immunity from suit." *Id.* at 20a. Rather, it found that "*Sherrill* dealt with 'the right to demand compliance with state laws.' It did not address 'the means available to enforce' those laws." *Id.* at 20a (quoting *Kiowa*, 523 U.S. at 755). The court of appeals believed *Sherrill* belonged to a line of "land-based" sovereignty decisions issued by this Court which address whether tribal sovereignty exists over land—but that *Sherrill* did not decide whether a tribe, which lacks sovereignty over taxable land, may nonetheless assert tribal immunity from suit as a defense to foreclosure for non-payment of taxes. *Id.* at 16a-17a. In reaching this conclusion, the court of appeals did not address the distinction between *in rem* and *in personam* jurisdiction drawn in *Yakima* despite being briefed by the parties.

Likewise, the court of appeals did not address the language in footnote 7 in *Sherrill* explicitly rejecting OIN's immunity from foreclosure and eviction. Instead, it relied on *Potawatomi* and *Kiowa*. Pet. App. at 32a. The concurring opinion noted the "rule of decision defies common sense," and deemed the result "so anomalous that it calls out for the Supreme Court to revisit *Kiowa* and *Potawatomi*" and "[reunite] law and logic."

D. Court of Appeals' Analysis Of The "Not Disestablished" Reservation

This Court's decision in *Sherrill* all but eliminated the factual and legal foundation for an existing "ancient Oneida reservation." Despite stating that it "need not decide today whether, contrary to the Second Circuit's determination, the 1838 Treaty of Buffalo Creek disestablished the Oneidas' Reservation," 544 U.S. at 215, n.9, this Court in *Sherrill* repeatedly referred to the Oneida reservation in the past tense, using the adjectives "ancient," "historic" and "former," *id.* at 202-03, 213, 215, 221, while observing "the longstanding, distinctly non-Indian character of the area and its inhabitants[,]" *id.* at 202.

The district court below relied on the Second Circuit's 2003 decision in *Sherrill* (reversed by this Court) in concluding that the Oneida reservation was "not disestablished" (Pet. App. at 73a-74a)—although the district court refused to identify the reservation's present-day boundaries. *See Oneida Indian Nation of New York v. Madison County*, 235 F.R.D. 559, 561 (N.D.N.Y. 2006). The district court below also determined that OIN's "not disestablished" reservation

qualifies as an Indian reservation under New York law and therefore is not subject to taxation under state law. Pet. App. at 73a-74a.

The court of appeals below stated that "a tribe's immunity from suit is independent of its lands," and noted that it need not reach the Counties' argument that OIN's reservation had been disestablished because its conclusion did not depend on it. Pet. App. at 16a. The court of appeals nonetheless addressed the status of the ancient Oneida reservation in a footnote, observing that this Court in *Sherrill* "explicitly declined to resolve the question of whether the Oneida reservation had been 'disestablished'...." Pet. App. at 16a n.6. The court of appeals then concluded, "[o]ur prior holding on this question—that 'the Oneidas' reservation was not disestablished,' *Oneida Indian Nation of N.Y.*, 337 F.3d at 167—therefore remains the controlling law of this circuit." Pet. App. at 17a, n.6.

SUMMARY OF THE ARGUMENT

1. Tribal sovereign immunity does not bar *in rem* foreclosure for nonpayment of real property taxes, as this Court held in *Sherrill*. *Sherrill* upheld the City of Sherrill's right to assess and collect ad valorem property taxes on fee lands recently purchased by OIN. This Court in *Yakima* similarly affirmed the right of local taxing authorities to foreclose on tribally-owned properties for non-payment of lawfully assessed ad valorem property taxes. The *Yakima* Court found the property tax created a burden on the property alone, and that an *in rem* foreclosure proceeding was not significantly disruptive to tribal self-government. This

Court's tribal sovereign immunity precedents concerning *in personam* actions have no application to an *in rem* proceeding to collect taxes lawfully owed by a tribe.

Other sovereigns (foreign nations and the fifty States) do not enjoy immunity from *in rem* tax foreclosure proceedings if they, like OIN, purchase land within the taxing and regulatory jurisdiction of another sovereign.

The common law recognition of tribal immunity rests on a weak foundation and should be reexamined. Even if it has some vitality today, tribal immunity from suit is much weaker than the immunity from suit granted to the fifty States under the Constitution. There is no basis in law or logic to give quasi-sovereign tribes greater protection from *in rem* foreclosure proceedings than States and foreign countries.

2. This Court should declare the Oneidas' "ancient," "historic" and "former" reservation to be disestablished or diminished. The 1794 Treaty of Canandaigua merely acknowledged the Oneidas' reservation lands created and defined in the Oneidas' 1788 Treaty with New York. Contemporaneous interpretations of state-created reservations in New York confirmed that New York, possessing the right of preemption, had the authority to enter into treaties with New York Indians and create under New York law limited reservations through retrocession.

Over the next fifty years (1788-1838), the Oneidas sold all but 5,000 acres to New York in a series of treaties.

The United States knew of and approved or acquiesced in these treaties.

Even if the federal government had authority or jurisdiction over the Oneidas' reservation in New York, the 1838 Treaty of Buffalo Creek clearly expresses the Oneidas' and the federal government's agreement and intention to remove the Oneidas from New York to new homes in the west and to disestablish or at least diminish the 5,000-acre reservation then remaining, in keeping with federal policy to remove all Indians from eastern states.

Following ratification of the 1838 Treaty, most of the Oneidas sold their remaining lands in New York and promptly emigrated from New York. There has been no Oneida reservation in New York (except possibly the thirty-two acre territory) for well over a century. To say there is a still a 450 square mile "not disestablished" Oneida reservation in central New York is contrary to historical fact, law and logic.

ARGUMENT

I. Tribal Sovereign Immunity Does Not Bar *In Rem* Foreclosure For Nonpayment Of Real Property Taxes.

A. *Sherrill* Directly Upheld The City Of Sherrill's Right To Assess And Collect Ad Valorem Property Taxes.

Sherrill squarely held that OIN is barred from exercising sovereignty—in whole or in part—over

parcels purchased on the open market in fee simple, as to which the "embers of sovereignty . . . [had] long ago [grown] cold." 544 U.S. at 214. OIN's tribal patchwork of land owned in fee simple is subject to the full jurisdiction and taxing authority of local governments. (*See* Map attached as Addendum B to Brief). Following *Sherrill*, no valid distinction can be drawn between the Counties' right to tax the land and its right to enforce those taxes through foreclosure and eviction. *Id.* at 214, n.7.

The record in *Sherrill* shows OIN asserted its tribal sovereign status as a complete bar to the City of Sherrill's right to assess *and collect* ad valorem property taxes. OIN specifically asserted tribal sovereign immunity from suit as a bar to the City's foreclosure and eviction proceedings. JA125a, 162a. In rejecting each aspect of OIN's asserted tribal sovereignty, and expressly rejecting Justice Stevens' suggestion that tribal immunity should bar the tax enforcement and eviction proceedings, *Sherrill*, 544 U.S. at 214 & n.7, this Court necessarily reached and rejected OIN's claim that its sovereign immunity from suit barred the *in rem* tax collection and *in personam* eviction proceedings.

The plain meaning of *Sherrill* was apparent to the Department of Interior in the months following the issuance of the decision. Associate Deputy Secretary of the Interior, James E. Cason, in a letter to OIN representative Ray Halbritter, dated June 10, 2005, stated:

> [I]t is our opinion that the Court in *City of Sherrill* unmistakably held that the lands at issue (property interests purchased by OIN on the open market) are subject to real

> property taxes. In the event the taxes are not paid, we believe such lands are subject to foreclosure.

JA74a.[6]

A contrary reading would divorce law from logic and in the process promote civil disobedience and disrespect for the law. It would eviscerate the Court's holding in *Sherrill* and encourage tribes to engage in disruptive tax protests, knowing that the taxing authorities were powerless to enforce lawfully-imposed real property taxes. Tribes, emboldened by the absence of any tax enforcement mechanisms, would be encouraged to flex and flaunt their tribal immunity from suit in other contexts as well, resisting lawfully-imposed zoning, land use and other regulatory requirements. *See Sherrill*, 544 U.S. 220 n.13; *State of New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 187-88, 302 (E.D.N.Y. 2007) (enjoining planned construction of 61,000 square foot gaming facility not in compliance with New York anti-gaming laws and environmental laws and local building, land use, sanitation and other regulatory requirements).

The court of appeals' incorrect reading of Sherrill would also permit OIN to re-litigate its sovereign immunity defense now, even though the defense was before this Court in 2005. This Court did not carve out any aspect of OIN's claimed sovereign immunity defense

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6. Cason's letter rejected OIN's request, post-*Sherrill*, to have the Department accept deeds to 331 taxable fee parcels and record them as restricted fee land, not subject to alienation, pursuant to 25 U.S.C. § 177 (Indian Trade and Intercourse Act).

from the *Sherrill* decision, and the opinion does not qualify, condition or restrict in any manner the right of local governments to assess and collect real property taxes.

Accordingly, the rule of decision in *Sherrill* that local governments have the authority to assess and collect real property taxes on OIN's recently purchased fee properties controls here and requires reversal of the judgment below.

B. This Court In *Yakima* Affirmed The Right Of Local Taxing Authorities To Foreclose On Tribally-Owned Properties For Non-Payment Of Lawfully Assessed Ad Valorem Property Taxes.

In *Yakima*, this Court upheld a local government's right to foreclose on tribally-owned properties for unpaid real property taxes. Specifically, this Court held that Yakima County in Washington State had the power to collect ad valorem property taxes through *in rem* foreclosure proceedings where those taxes were lawfully imposed on tribally-owned lands held in fee simple. 502 U.S. at 270. The lands in question in *Yakima* were fee-patented (alienable) lands within the tribe's reservation. Yakima County assessed ad valorem property taxes on the fee-patented lands, some of which were owned by the Yakima Nation, and others were owned in whole or in part by individual members of the Tribe. *Id.* at 256.[7] When the Yakima Nation and individual members

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7. A document styled "Stipulation of Facts for Summary Judgment" filed in the district court in *Yakima* detailed the Yakima Nations' interest on the fee land. *See* Excerpts of the *Yakima* Joint Appendix (attached as Addendum A, at 12a-13a).

refused to pay the assessed property taxes, Yakima County commenced *in rem* tax foreclosure proceedings. *Id.*

The Yakima Nation, on its own behalf and on behalf of its members owning fee patented parcels of land within the reservation, brought suit seeking an injunction to prohibit the assessment and collection of ad valorem property taxes on any of the fee lands within the reservation, whether owned by the Nation or its members. *Id.* Specifically, the Yakima Nation's complaint stated "[t]he defendants have scheduled a public tax sale of approximately 40 parcels of real estate located within the Yakima Indian Reservation in which the Yakima Nation and/or its members have a fee patent interest." Addendum A, at 5a. The Nation asserted it was "entitled to a judgment declaring that fee patent land . . .owned by the Yakima Nation and/or its enrolled members . . .are not subject to State or County ad valorem taxes. *Id.* The Yakima Nation specifically sought "an injunction against the defendants prohibiting . . . the levy, imposition or collection of ad valorem taxes upon the fee patent land of the Yakima Nation and its tribal members . . . ." *Id.* at 9a.

This Court recognized Yakima County's right to tax *and* foreclose on the Indian-owned lands inside the Yakima reservation—including both tribally-owned and individually-owned parcels—observing that the alienability of the lands "rendered them subject to assessment and forced sale for taxes." *Yakima*, 502 U.S. at 263-64. This Court rejected the arguments advanced by the Yakima Nation and United States that the resulting parcel-by-parcel taxation of fee-patented lands

within the Yakima Reservation would create an "impracticable, *Moe*-condemned 'checkerboard' effect. . . ." *Id.* at 264-65. In doing so, this Court drew a distinction (which the court of appeals below failed to recognize) between *in rem* and *in personam* jurisdiction:

> [B]ecause the jurisdiction is in rem rather than in personam, it is assuredly not *Moe*-condemned; and it is not impracticable either.
>
> * * *
>
> While the in personam jurisdiction over reservation Indians at issue in *Moe* would have been significantly disruptive of tribal self-government, *the mere power to assess and collect a tax on certain real estate is not.*

Id. at 265 (emphasis added).

This Court further explained in *Yakima* that the assessment of ad valorem property taxes "creates a burden on the property alone," such that the "[l]iability for the ad valorem taxes flows exclusively from ownership of realty on the annual date of assessment." *Id.* at 266. Thus, this Court in *Yakima* recognized the distinction between an *in rem* proceeding involving real estate held by a tribe, on the one hand, and an *in personam* proceeding against a tribe, on the other hand.[8]

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8. In altogether overlooking the distinction between *in rem* and *in personam* jurisdiction, the court of appeals failed to (Cont'd)

Under *Sherrill* and *Yakima* state and local taxing authorities have the right to impose *and collect* real property taxes assessed on Indian-owned land held in fee simple within the sovereign jurisdiction of the State—even if the land is located within the boundaries of an existing reservation, as was the case in *Yakima*. Tribal sovereign immunity from suit erects no bar to foreclosure in either case because an *in rem* proceeding to take title to property for unpaid taxes is directed to the "res," not the tribe, and is not disruptive of tribal self-government.[9]

(Cont'd)
evaluate the specifics of New York foreclosure law or the particular foreclosure procedures employed by the Counties. New York law recognizes that a foreclosure action is not a proceeding against the taxpayer; it is an *in rem* proceeding directed to the tax-delinquent parcel. *In re Burg*, 295 B.R. 698, 703 (Bankr. W.D.N.Y. 2003) (it "is a proceeding against property and not against an individual.") (applying New York law). *See* 13 Warren's Weed, New York Real Property, Tax Foreclosures, Ch. 134, § 134.01-134.04 (5th ed. 2010). In keeping with that legal framework, the Counties employed *in rem* foreclosure procedures to the fee lands in question. Madison County used a judicial foreclosure process. Oneida County employed an administrative foreclosure procedure similar to the one followed by the City of Sherrill. *See supra* note 5.

9. This Court's analysis in *Yakima* applies even more forcefully if the Oneidas' former reservation is declared disestablished or severely diminished (*see infra* Part II). Especially, in that case, collecting taxes on the fee lands does not disrupt tribal self-governance.

C. This Court's Sovereign Immunity Precedents Concerning *In Personam* Actions Against Tribes Have No Application Here.

1. *Potawatomi* Is Inapposite.

Potawatomi "clarif[ied] the law of sovereign immunity with respect to the collection of *sales taxes on Indian lands*." 498 U.S. at 509 (emphasis added). The Court in *Potawatomi* did not purport to determine anything whatsoever about tribal immunity with respect to the collection of *real property taxes on fee lands within the taxing and regulatory jurisdiction of a state*. *Potawatomi* does not diminish the *Yakima* rule that an *in rem* foreclosure proceeding to collect lawfully-imposed property taxes on fee land does not violate tribal sovereignty because it is not "significantly disruptive of tribal self-government . . . ." *Yakima*, 502 U.S. at 265.[10] To the contrary, this Court in *Yakima* did not rely on *Potawatomi*—even though both the Yakima Nation and the United States cited *Potawatomi* in their briefs. *See* Brief of Respondent/Cross-Petitioner, 1991

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10. OIN operates the highly profitable Turning Stone Casino (www.turningstone.com), and certainly can pay property taxes without impairing its ability to govern itself. *See* Glenn Coin, *Oneida Nation Profits $115M Report Commissioned by State Shows Nation's Businesses Worth $2 Billion*, The Post-Standard (Syracuse, NY), Mar. 17, 2007, at A1 (2007 WLNR 5097843), OIN reported on November 19, 2010 that it was awarding $4.3 million in bonuses to about 90% of its 4,500 employees, stating that "although the U.S. economy remains stagnant . . . the Nation's enterprises . . . performed exceedingly well and again exceeded last year's economic performance." *See* http://www.oneidaindiannation.com/pressroom (last visited November 20, 2010).11

WL 521292, *35, *39 (1991); Brief for the United States as Amicus Curiae Supporting Respondent/Cross-Petitioner, 1991 WL 11009207,*7 (1991). This Court apparently deemed it unnecessary to distinguish the immunity rule in *Potawatomi* in that it did not control the case of *in rem* foreclosure proceedings to collect real property taxes on fee land.

The Court in *Potawatomi* emphasized that the tribal store in question was located on federal trust lands and acknowledged the tribe exercised sovereignty over that land. 498 U.S. at 508, 511. Given the tribe's sovereignty over the land (which is altogether missing as to the parcels at issue in *Sherrill* and here) this Court rejected the Oklahoma taxing authority's bid to sue the tribe to enforce the tribe's sales tax collection obligations for sales of cigarettes to nonmembers of the tribe, even though Oklahoma had a lawful right to tax those sales. *Id.* at 507, 512-13.

The Court specifically noted that the State of Oklahoma was not left without a remedy inasmuch as it could collect the sales tax from the wholesale distributor, and because the State could sue individual members of the tribe who violated Oklahoma law with respect to collecting sales taxes on cigarettes sold at the store. *Id.* at 514.

This Court also noted that the State of Oklahoma could seize unstamped cigarettes off the reservation. *Id.* at 514. By authorizing an *in rem* off-reservation seizure of the cigarettes—on lands within the taxing and regulatory jurisdiction of Oklahoma—*Potawatomi* actually supports rather than undermines the right of

the Counties to collect by foreclosure real property taxes assessed on lands located within the taxing and regulatory jurisdiction of New York State. The Second Circuit's reading of *Sherrill*, in contrast, leaves the Counties without an adequate remedy for nonpayment of real property taxes.[11]

2. *Kiowa* Is Inapposite.

Although the Second Circuit purported to follow *Kiowa*, that case is wholly inapposite. *Kiowa* did not involve state taxation or any regulatory action. Rather, *Kiowa* involved an *in personam* breach of contract action against the tribe, brought by a private party that voluntarily entered into a transaction with the tribe. *Kiowa*, 523 U.S. at 754. This Court concluded that the *in personam* action was barred by the doctrine of tribal

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11. The court of appeals suggests, without explaining, that "[i]ndividual tribal members and tribal officers in their official capacity remain susceptible to suits for damages and injunctive relief" in connection with OIN's nonpayment of property taxes. Pet. App. 23a. This suggestion would only lead to more litigation without any assurance that this "remedy" is viable. Susceptibility to suit may, but does not necessarily, equate to individual liability for unpaid tribal property taxes. Whether the Northern District of New York was right or not, it concluded in 2001 that it was "clear that the [OIN] representatives cannot be held personally liable for the unpaid property taxes" owed to the City of Sherrill. *Sherrill*, 145 F. Supp. 2d at 263; *aff'd on other grounds*, 337 F.3d at 169 (affirming dismissal of claims against tribal members and officers on ground that lands were not taxable), *rev'd*, 544 U.S. at 203, 212; *see also Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 542 F. Supp. 2d 908, 921 (E.D. Wis. 2008) (observing "no other means of recovery for unpaid property taxes exists" besides foreclosure).

sovereign immunity. *Id.* at 760. At the same time, this Court frankly noted that "there are reasons to doubt the wisdom of perpetuating the doctrine," *id.* at 758, but felt compelled to adhere to it because Congress had not dispensed with it. *Id.* at 759-60. The Court, however, did not suggest that it was overruling or restricting *Yakima* in any way, and certainly did not suggest that a state sovereign is powerless to collect lawfully-imposed real property taxes.

D. Principles Of Tribal Sovereign Immunity From Suit, Developed In The Context Of *In Personam* Actions Brought Directly Against Tribes, Should Not Be Extended To *In Rem* Foreclosure Proceedings To Collect Delinquent Taxes.

1. The Limited Nature of *In Rem* Actions

As this Court recognized in *Yakima*, because an *in rem* foreclosure proceeding is directed to the land, rather than to the landowner, it is not significantly disruptive of tribal self-government. *See* 502 U.S. at 256, 265. This is true whether the tax foreclosure proceeding is brought under Washington law as in *Yakima* or under New York law as here. *See In re Burg*, 295 B.R. at 703 and note 8, *supra*.

2. The Limits On Sovereign Immunity When One Sovereign Owns Land In Another Sovereign's Territory

This Court's sovereign immunity jurisprudence regarding the fifty States and foreign countries denies

immunity to sovereigns who acquire real property within the jurisdiction of another sovereign. In the foreign immunity context, the "immovable property" exception means foreign countries do not have immunity with respect to land purchased in the United States, except land used for official diplomatic and consular purposes. *See City of New York v. Permanent Mission of India to the U.N.*, 446 F.3d 365, 374 (2d Cir. 2006), *aff'd*, 551 U.S. 193 (2007) ("when owning property here, a foreign state must follow the same rules as everyone else"); 28 U.S.C. 1605(a)(4) (providing that "[a] foreign state shall not be immune from the jurisdiction of the United States . . . in any case . . . in which . . . rights in immovable property situated in the United States are in issue"); Restatement (Second) of Foreign Relations Law § 68(b) (1965) ("[t]he immunity of a foreign state . . . does not extend to . . . an action to obtain possession of or establish a property interest in immovable property located in the territory of the State exercising jurisdiction"); *see also* Restatement (Third) Foreign Relations Law §§ 455(10)(c), 460(2)(e) (1987) (re-adopting "immovable property" exception). Any land that is not used for diplomatic or consular purposes is treated as private property held by a private owner. It is subject to the full panoply of state and local taxation and regulation. This includes *in rem* actions against "real property located in the territory of the state exercising jurisdiction." Restatement (Second) of Foreign Relations Law § 68(b), cmt. d (noting foreign nation is not entitled to raise sovereign immunity as a defense to state *in rem* condemnation action). Thus, if a foreign nation failed to pay lawfully-imposed real property taxes, it could not raise sovereign immunity as a defense to an *in rem* foreclosure proceeding.

An equivalent "immovable property" rule applies to state sovereigns: "[L]and acquired by one state in another state is held subject to the laws of the latter and to all the incidents of ownership." *Georgia v. City of Chattanooga*, 264 U.S. 472, 480 (1924). The acquiring state cannot extend its sovereignty over the land. *Id.* at 481; *see State v. City of Hudson*, 42 N.W.2d 546, 548 (Minn. 1950) ("[A] state acquiring ownership of property in another state does not thereby project its sovereignty into the state where the property is situated. The public and sovereign character of the state . . . ceases at the state line[.]"). Thus, if a State acquires land within the taxing jurisdiction of another State, the acquired land is subject to taxation. The out-of-state-sovereign is treated like a private citizen; its property may be subjected to a forced tax sale to satisfy unpaid taxes. *See City Council of Augusta Ga. v. Timmerman*, 233 F. 216, 217, 219 (4th Cir. 1916) (land located in South Carolina, owned by Georgia, subject to forced tax sale).

3. The Limited Scope Of Tribal Sovereignty

Native American tribes have been described as "domestic dependent nations," *Cherokee Nation*, 30 U.S. at 17, and "wards of the nation," *United States v. Kagama*, 118 U.S. 375, 382 (1886), giving tribes a "peculiar 'quasi-sovereign' status." *Three Affiliated Tribes*, 476 U.S. at 890-91. Tribes retain "a semi-independent position . . . not as States, not as nations, not as possessed of full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (citations

omitted);[12] *see also Wheeler*, 435 U.S. at 323 ("The sovereignty that the Indian tribes retain is of a unique and limited character."). Indeed, tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance." *Id.*

The "unique and limited character" of tribal sovereignty stands in contrast to the plenary sovereignty of the federal government and each of the fifty States under the Constitution. *See Alden v. Maine*, 527 U.S. 706, 712-15 (1999) ("our Constitution . . . reserves to [the States] a substantial portion of the Nation's primary sovereignty . . . . The States thus retain 'a residuary and inviolable sovereignty.'").

4. The Unsound Foundation Of Tribal Sovereign Immunity From Suit

Tribal immunity from suit is not constitutionally protected, but rather developed as part of this Court's common law. *See Kiowa*, 523 U.S. at 756.[13] In *Kiowa* this Court recognized that the doctrine of tribal sovereign immunity "developed almost by accident" and is said to "rest on the Court's opinion in *Turner v. United States*, 248 U.S. 354 (1919) . . . [which] simply does not stand for that proposition." *Kiowa*, 523 U.S. at 756. Justice

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12. Tribes are "unique aggregations possessing attributes of sovereignty over both their members and territory." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) (quoting *U.S. v. Mazurie*, 419 U.S. 544, 577 (1975)).

13. In contrast, the immunity afforded to the federal government and the several States is rooted in the Constitution. *See Alden*, 527 U.S. at 712-14.

Stevens' dissenting opinion in *Kiowa* (joined by Justices Thomas and Ginsburg) observed that the doctrine of tribal immunity from suit had been questioned by Justice Blackmun, "one of the strongest supporters of Indian rights on the Court," in *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165 (1977). *Kiowa*, 523 U.S. at 762. In *Puyallup*, Justice Blackmun doubted "the continuing vitality in this day of the doctrine of tribal immunity" and believed "the doctrine may well merit re-examination in an appropriate case." 433 U.S. at 178-79 (Blackmun, J., concurring). In a concurring opinion in *United States v. Lara*, 541 U.S. 193, 218 (2004), Justice Thomas also questioned the continued recognition of tribal sovereignty because "[i]t is quite arguably the essence of sovereignty not to exist merely at the whim of an external government."

To the extent the common law doctrines of tribal sovereignty and tribal immunity from suit have any vitality today, tribes enjoy only "a limited immunity from suit" commensurate with the "unique and limited character" of tribal sovereignty. *Three Affiliated Tribes*, 476 U.S. at 890-91 ("Of course, because of the peculiar 'quasi-sovereign' status of Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy.")

Indian semi-sovereignty and limited tribal immunity from suit should not be extended to bar tax collection or regulatory enforcement concerning fee lands that are exclusively within the sovereign jurisdiction of one of the fifty States. To allow OIN to assert tribal immunity as a defense to the Counties' tax collection

proceedings—where the taxes were lawfully imposed on fee land within New York State's territorial jurisdiction as expressly held in *Sherrill*—is to undermine State sovereign authority over its territory while rewarding OIN for defying this Court's decision.

E. Extending Tribal Sovereign Immunity From Suit To Bar *In Rem* Foreclosure Would Unjustifiably Endow Tribes With Super-sovereignty.

Denying the Counties the right to collect lawfully-imposed real property taxes creates without justification a kind of super-sovereignty for tribes that gives them the right to resist lawful taxes and regulatory requirements that no foreign nation or state sovereign enjoys. That result cannot be reconciled with the "limited character" of tribal sovereignty and a tribe's correspondingly limited immunity from suit. In short, Indian tribes do not have "super-sovereign authority to interfere with another jurisdiction's sovereign right[s] . . .within that jurisdiction's limits." *Chickasaw Nation*, 515 U.S. at 466.

Accordingly, this Court should reverse the judgment of the court of appeals that held sovereign immunity bars the Counties from foreclosing on OIN's fee-owned parcels. In doing so, this Court should make clear that if OIN chooses not to redeem the delinquent parcels by paying the lawfully-imposed taxes and statutory interest and penalties, and instead continues to defy the rule of law established by this Court, the Counties may foreclose and, if necessary, bring eviction proceedings against the tribe and its members to gain lawful possession, as this Court previously authorized the City of Sherrill to do.

OIN should acknowledge that the fee lands are within the taxing and regulatory jurisdiction of the Counties under *Sherrill* and pay the property taxes that are lawfully owed.

II. This Court Should Declare the Oneidas' "Ancient," "Historic" And "Former" Reservation To Be Disestablished Or Diminished.

The district court below found that "[t]he Nation's reservation was not disestablished," citing the Second Circuit's 2003 decision in *Sherrill*, 337 F.3d at 167. Pet. App. at 73a. The district court then held that because "the properties at issue are located within the Nation's reservation," they are exempt from taxation under New York State law. *Id.* at 73a-74a, 44a-45a. The Second Circuit reaffirmed its prior holding on the disestablishment question. *See* Pet. App., at 16a-17a, n.6. As a result, if this Court should reverse the judgment below and hold that tribal sovereign immunity from suit does not bar foreclosure, the reservation issue will need to be resolved. The Court should resolve that issue now. To perpetuate a questionable pre-*Sherrill* finding that there is a "not disestablished" Oneida reservation of some 250,000 to 300,000 acres (or 400 to 450 square miles) only creates uncertainty, jurisdictional and tax disputes, and community disruption in Madison and Oneida Counties.

The historical record shows the Oneida reservation was established by the 1788 Treaty of Fort Schuyler ("1788 Treaty") between the Oneidas and New York State. JA197a-202a. The 1794 Treaty of Canandaigua ("1794 Treaty") between the United States and the Six

Nations (including the Oneidas) (7 Stat. 44) (JA202a-208a) "acknowledged" the Oneida reservation established under the 1788 Treaty. But the 1794 Treaty did not confer any legal rights on the Oneidas or abrogate the rights of New York State under the 1788 Treaty. Moreover, the Oneida reservation established by New York was disestablished or diminished as the result of land sale treaties with New York over a fifty-year period from the late 1700s to the mid-1800s (condoned by and in many cases facilitated by the federal government); by the Treaty of Buffalo Creek in 1838 (7 Stat. 550) ("1838 Treaty") (JA208a-245a); and by the fact of the Oneidas' near-complete removal from New York by the mid-nineteenth century.

As this Court stated in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998),"[e]ven in the absence of a clear expression of congressional purpose [to diminish a reservation], unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished." *Id.* at 351 (citing *Solem v. Bartlett*, 465 U.S. 463, 471 (1984)). Further, "where non-Indian settlers flooded into . . . a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." *Id.* at 356 (citing *Solem*, 465 U.S. at 471).

This brief applies these principles to the historical record beginning with this Court's findings in *Sherrill* regarding the former Oneida reservation.

A. This Court's Observations About The Oneidas' Former Reservation In New York

This Court in *Sherrill* did not decide whether the Oneidas' "historic," "ancient" and "former" reservation

in central New York had been disestablished by the 1838 Treaty of Buffalo Creek and subsequent developments, including the almost complete removal of Oneidas from New York and alienation of their remaining landholdings in New York, save thirty-two acres. 544 U.S. at 215, n.9. Yet the historical realities all pointed toward a disestablished (or at least severely diminished) reservation from which the Oneidas had removed by the mid-nineteenth century. This Court not only consistently described the claimed reservation in the past tense, *id.* at 202-03, 213, 215, 221, it observed "the longstanding, distinctly non-Indian character of the area and its inhabitants[,]" *id.* at 202. Twenty years earlier, Justice Stevens, in a dissenting opinion in *Oneida II* reviewed the pertinent history and observed that "[t]here is ... a serious question whether the Oneida did not abandon their claim to the aboriginal lands in New York when they accepted the Treaty of Buffalo Creek of 1838 . . . ." *Oneida County v. Oneida Indian Nation of New York*, 470 U.S. 226, 269 n.24 (1985).

B. The Court Of Appeals' 2003 (Pre-*Sherrill*) Analysis of Disestablishment

The court of appeals took a very different view of the Oneidas' history in New York—without the benefit of this Court's decision in *Sherrill*—and concluded that the 1838 Treaty neither diminished nor disestablished the Oneida Reservation in New York. 337 F.3d at 165 The court of appeals' decision gives almost no weight to the federal removal policy that motivated and informed the 1838 Treaty, *id.* at 163, and is equally or more dismissive about the subsequent history that confirms the Oneidas' nearly complete removal from New York

State, *id.* at 163-64.[14] Instead, the court of appeals focused on a perceived lack of clarity about the federal government's intent as expressed in the Treaty itself, and on a declaration from a U.S. treaty commissioner, executed after the treaty was signed, stating that the Commissioner had advised some Oneidas that if they did not want to sell their lands and emigrate, they did not have to—they would not be forced to leave. *Id.* at 161-62.

A fair reading of the historical record before and after 1838 resonates with this Court's findings in *Sherrill* and supports the conclusion that the federal government intended in the Treaty of Buffalo Creek to diminish or disestablish the Oneidas' reservation in New York. After reviewing the pertinent history below in subsections C and D, subsection E discusses the errors of both fact and law in the court of appeals' pre-*Sherrill* analysis that led it to a contrary conclusion.

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14. The court of appeals incorrectly stated that "the sales to New York State were never accomplished, and the planned removal never took place." 337 F.3d at 161-162. While certain federal funding was not made available to help with the removal, the record unambiguously shows the Oneidas entered into a series of land purchases with New York State between 1838 and 1846, expressly authorized by the 1838 Treaty, and the majority of Oneidas emigrated from New York in that period. *See Sherrill*, 544 U.S. at 207; *infra* Part II.D.2. As a result, the Oneidas' landholdings and number of tribal members in New York sharply declined after 1838, as contemplated by the parties to the 1838 Treaty. *See Sherrill*, 544 U.S. at 207; *infra* Parts II.D.1-3.

C. The Historical Record Before 1838

1. New York State Created The Oneida Reservation Under New York Law In 1788.

New York State entered into the Treaty of Fort Schuyler with the Oneidas in 1788—before the U.S. Constitution became effective—which established a state reservation. JA197a-202a. This reservation was a creature of New York law, defined by New York law, and was a valid exercise of New York State sovereignty under the Articles of Confederation. *See Oneida Indian Nation of New York v. New York*, 860 F.2d 1145, 1160-61 (2d Cir. 1988). New York's authority to deal with the Oneidas was rooted in the fact that New York held the right of preemption to their lands. As this Court noted in *Oneida I*, "the United States never held fee title to the Indian lands in the original states as it did to almost all the rest of the continental United States and that fee title to Indian lands in these states, or the pre-emptive right to purchase from the Indians, was in the state." *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 670 (1974).

The 1788 Treaty's "First" Article states in its entirety:

> First, The Oneidas do cede and hereby grant all of their lands to the State of New York forever.

JA 197a. The "Second" Article, then describes specific lands that "shall be reserved" from "the said ceded lands." JA197a-199a. The effect of the plain treaty

language was to convey all the Oneidas' lands to New York, and thereby extinguish aboriginal title. New York, as the sovereign vested with the right of preemption, acquired absolute fee title to the ceded lands. Only after that complete cession, and only out of the "said ceded lands," did New York "reserve" the Oneida reservation, over which the State retained substantial jurisdiction, as described in the treaty.

Early authorities confirm this interpretation. In 1823, the Supreme Court of Judicature of New York (Chancellor James Kent), described the treaty as follows:

> [I]n Sep., 1788, we have the remarkable fact of the Oneidas ceding the whole of their vast territory to the people of this State, and accepting a retrocession of a part, upon restricted terms, and with permission only to lease certain parts for a term not exceeding 21-years.

Goodell v. Jackson, 20 Johns 693, 729 (N.Y. Sup. Ct. 1823). This Court in 1831 specifically acknowledged the right of New York, in the confederal period, to create Indian reservations by retrocession. *See Cherokee Nation*, 30 U.S. at 17 ("Treaties were made with some tribes by the state of New York, under a then unsettled construction of the Confederation, by which they ceded all their lands to that state, taking back a limited grant to themselves, in which they admit their dependence."). This Court's observations in *Cherokee Nation* necessarily referred to the Oneidas and the 1788 Treaty, among others.

Because the 1788 Treaty was a New York State treaty, that treaty is properly construed under New York law as stated by the Supreme Court of Judicature of New York in *Goodell*. And as construed under New York law, the Oneidas did not retain aboriginal title to the state-created reservation lands, which is the premise underlying the alleged existence of a federally-protected treaty right under the 1794 Treaty of Canandaigua.

2. The 1794 Treaty Of Canandaigua Did Not Create A Federal Reservation.

The 1794 Treaty was intended to: (1) reconfirm peace between the United States and the Senecas, in particular over that part of Pennsylvania known as the Erie Triangle, located immediately west of New York State; (2) correct an inadvertent geographical error along the western boundary of New York; and (3) relinquish any rights the United States may have acquired through that error. *See Seneca Nation of Indians v. State of New York*, 206 F. Supp. 2d 448, 487 (W.D.N.Y. 2002). OIN itself has argued that the Treaty of Canandaigua did not apply within the State of New York. *Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070, 1096-97 (2d Cir. 1982).

In keeping with its focus on the western boundaries of New York, the 1794 Treaty includes sparse verbiage regarding the Oneidas' reservation 200 miles to the east. U.S. Commissioner Timothy Pickering understood that the United States had neither title to, nor jurisdiction over, those lands since "the whole lay within the jurisdiction of New York." *Seneca Nation of Indians*,

206 F. Supp. 2d at 491. New York State also held the right of preemption to those lands. *See Oneida I*, 414 U.S. at 667. Because New York exercised jurisdiction over the Oneidas' lands in New York, and held the right of preemption to those lands, the 1794 Treaty could not have created a federal Indian reservation there, or convert the state reservation into a federal reservation, without impairing the rights of New York under the 1788 Treaty.

The absence of any intent to establish a federal reservation in the 1794 Treaty is further shown by contrasting the language of the November 11, 1794 Treaty with the August 3, 1795 Treaty of Greeneville (7 Stat. 49) with the Wyandots and other tribes, which was also executed under Pickering's supervision and with his approval. That treaty—unlike the 1794 Treaty—concerned lands in the Northwest Territory (in what later became the States of Ohio and Indiana) that were within the federal government's jurisdiction and as to which the federal government held the right of preemption. *See generally Strong v. United States*, 207 Ct. Fed. Cl. 254, 258-73 (1975). Accordingly, the 1795 Treaty of Greenville clearly and unambiguously restricted the tribes' right to sell to only the United States:

> [W]hen those tribes . . . shall be disposed to sell their lands . . . they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their land against all citizens of the United States . . ..

> And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever.

7 Stat. 49, 52.

3. The Oneidas Sold 295,000 Of The Original Reservation's 300,000 Acres In Land Sale Treaties With New York Before 1838.

As noted above, New York held the right of preemption to the underlying fee title in the Oneidas' lands. After the Constitution was adopted in 1789, New York State and the fledging central government sometimes disagreed on the division of responsibility and jurisdiction over the Oneidas and other New York Indians who lived on state-created reservations. *See generally The Oneida Indian Nation of New York v. United States*, 43 Ind. Cl. Comm. 373, 375-385 (1978). New York continued to exercise powers that it believed it possessed through the right of preemption and powers constitutionally allocated to the States. *See id.* New York continued to enter into land sale transactions with the Oneidas and other New York Indians as part of a policy to remove Indians from New York. *See id.* at 385-395. At least as early as 1808—three decades before the Treaty of Buffalo Creek—the federal government and New York were of a single mind to "mov[e] Indians from the east to the newly acquired lands in the west." *Id.* at 389; *see id.* (noting Federal Indian Agent and New York State Judge together petitioned the Secretary of War in 1808 to make lands west of Mississippi available for removal of New York Indians).

Between 1795 and 1846, New York State entered into 25 treaties with the Oneidas. *Id.* at 373-374. Through these treaties New York State "acquired virtually the entire Oneida reservation." *The Oneida Indian Nation of New York v. United States*, 26 Ind. Cl. Comm. 138, 140 (1971). As determined by the Indian Claims Commission in proceedings initiated by the Oneida Indian Nation of New York, which lasted 27 years (1951-1978), the United States directly participated in two treaties (the June 1, 1798 Treaty and June 4, 1802 Treaty) *United States v. The Oneida Nation of New York*, 201 Ct. Fed. Cl. 546, 555 (1973), and had actual or constructive notice of all of the other 23 treaties. *Oneida Indian Nation*, 43 Ind. Cl. Comm. at 375. Indeed, as this Court noted in *Sherrill*, "[a]s recounted by the Indian Claims Commission in 1978, early 19th-century federal Indian agents in New York State did not simply fail to check New York's land purchases, they 'took an active role . . . in encouraging the removal of the Oneidas . . . to the west.' " 544 U.S. at 205-06 (quoting 43 Ind. Cl. Comm. at 390); *see* 43 Ind. Cl. Comm. at 391 ("[Federal] Indian agents . . . were deeply involved in the plans of both New York State and the Ogden Land Company to bring about the removal of the Six Nations to the west and the acquisition of their lands by New York State.").

The Indian Claims Commission summed up the historical record on New York State and Federal Government collaboration on Indian removal as follows:

> The record also indicates that the United States had no desire to take any action to prevent New York from doing what would otherwise have been the Government's job,

> i.e., buying lands from the New York Indians in order to persuade them to move west. The Federal Government's removal policy applied not just to New York State, but to the entire Atlantic seaboard. In New York State the state was carrying out policy with very little Government help and that evidently was much to the liking of the Federal Government.

Id. at 405.

D. The 1838 Treaty of Buffalo Creek Between The United States and The New York Indians Expressed The Intention Of The United States To Disestablish or Diminish the Oneida Reservation in New York.

To the extent the federal government had any authority or jurisdiction over the state-created Indian reservations in New York State, the 1838 Treaty is clear on its face about the federal government's intent to disestablish or diminish the Oneida reservation in New York. This is true whether that reservation is understood to be a federal or state reservation. The 1838 Treaty's lengthy initial "whereas" clause (or preamble) notes the Indians' recognition of the pressures they faced from white settlement and development, and their need to "seek a new home among their red brethren in the West." JA208a. The preamble further recounts that the United States previously secured lands in the Territory of Wisconsin to provide a new home for the Six Nations (including the Oneidas) removing from New York. JA208a-210a. The preamble provides that under the 1838 Treaty the Six Nations will remove instead to the

Indian territory west of the Mississippi. *Id.* The final whereas clause acknowledges President Van Buren's embrace of the federal policy of removal:

> [T]he President is . . . determined to carry out the humane policy of the Government in removing the Indians from the east to the west of the Mississippi, within the Indian territory, by bringing them to see and feel . . . that it is their . . . interest to do so without delay.

JA210a.

The obligation to remove to the Indian territories is defined in Article 2 of the 1838 Treaty, which provides that the United States has agreed to "set apart a tract of country situated directly west of the State of Missouri, as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes . . ." JA211a. Article 2 further provides that the "above described country is intended as a future home for the following tribes, to wit: The Senecas, Onondagas, Cayugas, Tuscaroras, *Oneidas*, St. Regis, Stockbridges, Munsees, and Brothertowns residing within the State of New York . . . ." JA212a. (emphasis added).

Two other provisions expand on the treaty rights and obligations of the Oneidas in New York. Article 5 provides that, "[t]he Oneidas are to have their lands in the Indian territory . . . ." JA213a. Article 13 lays out compensation terms for New York Oneidas and authorizes them to sell their remaining lands to New York in accordance with their agreement to remove:

> The United States will pay the sum of four thousand dollars to be paid to Benjamin Powlis, and the chiefs of the first Christian Party residing at Oneida, and the sum of two thousand dollars shall be paid to William Day, and the chiefs of the Orchard Party residing there, for expenses incurred and services rendered in securing the Green Bay country, and the settlement of a portion thereof, and they hereby agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida.

JA218a.

Further evidence of the federal intent to substantially diminish if not disestablish the Oneida reservation is set out below. It consists of three categories of historical information: (1) contemporaneous records in the form of Presidential proclamations regarding the 1838 Treaty and federal policy to remove all Indians from New York and other eastern States—showing the 1838 Treaty as a natural step in the removal process that had already diminished the Oneida reservation by 98%; (2) records regarding the implementation of the 1838 Treaty including a series of state treaties in the 1840s by which the Oneidas sold most of their remaining land in New York and promptly removed to Wisconsin and Canada; and (3) records documenting the subsequent development of the former reservation, including the flood of non-Indian settlers and loss of any Indian character, as this Court observed in *Sherrill*.

1. Contemporaneous Historical Record Of 1838 Treaty

The 1838 Treaty was an expression of the federal government's then-existing "remedial" policy to remove Indians from all eastern states. *See Oneida Indian Nation*, 43 Indian Cl. Comm. at 391-403 (describing the federal removal policy and "outlining in detail the negotiations leading up to the Treaty of Buffalo Creek."). The federal removal policy was set forth in various acts of Congress, including the Indian Removal Act of 1830 (4 Stat. 411). Article 2 of the 1838 Treaty expressly identifies the Indian Removal Act as authorizing the terms of the Treaty. JA212a. President Martin Van Buren's message to Congress on December 3, 1838 recounted the policy's history:

> The remedial policy, the principles of which were settled more than thirty years ago under the Administration of Mr. Jefferson, consists in an extinction, for their consideration, of the title to all the lands still occupied by the Indians within the States and Territories of the United States; their removal to a country west of the Mississippi much more extensive and better adapted to their condition than that on which they resided ... [t]his has not been the policy of particular Administrations only, but of each in succession since the first attempt to carry it out under that of Mr. Monroe.

3 James D. Richardson, A Compilation of the Messages and Papers of the Presidents 1833-1841, Second Annual Message (December 3, 1838), at 498 (1897).

In his message to Congress two years later, President Van Buren reinforced the message about the Indian removal policy and reported on its success during his administration:

> The policy of the United States in regard to the Indians, of which a succinct account is given in my message of 1838, and of the wisdom and expediency of which I am fully satisfied, has been continued in active operation throughout the whole period of my Administration. Since the Spring of 1837 more than 40,000 Indians have been removed to their new homes west of the Mississippi, and I am happy to add that all accounts concur in representing the result of this measure as eminently beneficial to that people.

Id., Fourth Annual Message (December 5, 1840), at 616.

President Van Buren proclaimed the Treaty of Buffalo Creek on April 4, 1840.

2. Land Sales to New York And Removal Of Oneidas Post-1838

The Oneidas possessed approximately 5,000 remaining acres in 1838 and sold 80% of that land to New York State within five years of signing the Treaty

of Buffalo Creek. *Sherrill*, 544 U.S. at 206-07 ("By 1843, the New York Oneidas retained less than 1,000 acres in the State").[15] *See Oneida Indian Nation*, 43 Ind. Cl. Comm. at 385 (detailing Oneida–New York State treaties between June 19, 1840 and February 23, 1846). The Indian Claims Commission specifically determined that these treaties were authorized by the Treaty of Buffalo Creek. *Id.* at 385, 406-07. The Oneidas who sold their lands removed to Wisconsin or Canada, as intended and agreed. *See* The Oneida Indian Journey from New York to Wisconsin, 1784-1860, at 13 (Laurence M. Hauptman & L. Gordon McLester III eds., 1999) ("[t]he decline of the Oneida Nation not only led most of these Indians to Wisconsin, but also prompted a sizable migration of Oneidas to Ontario, in three separate groups from 1839 to 1845"). As a result, the number of Oneidas in New York dropped from 620 in 1838 to about 200 by 1845. *Id.*

Accordingly, the record shows the great majority of Oneidas in New York sold their land and migrated from New York as intended and agreed. At the very least, the federal government intended the Oneida reservation to be diminished as the Oneidas sold their lands and removed from New York following execution of the 1838 Treaty.

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15. The Oneidas' landholdings in New York State "dwindled to 350 acres in 1890; ultimately, by 1920, only thirty-two acres continued to be held by the Oneidas." *Sherrill*, 544 U.S. at 207.

3. Historical Record of Developments After 1838

This Court in *Sherrill* reviewed the subsequent development of the former reservation lands in central New York, noting in the "different, but related, context of the diminishment of an Indian reservation that '[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and land use,' may create 'justifiable expectations.' " *Sherrill*, 544 U.S. at 215 (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-05 (1977)). Those considerations apply equally here with respect to the diminishment or disestablishment of the Oneida reservation in New York. Thus, the Court may look to (a) events that occurred after 1838 and the subsequent treatment of the area; (b) established jurisdictional patterns and the development of justifiable expectations; (c) changes in the demographics of the area; (d) maps; and (e) administrative documents. *See Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999); *Solem*, 465 U.S. 463; *Hagen v. Utah*, 510 U.S. 399 (1994); *Rosebud*, 430 U.S. 584. All of this evidence supports the conclusion that the United Sates intended to severely diminish, if not disestablish, the Oneida reservation by entering into the 1838 Treaty, and that these intended effects were achieved both *de facto* and *de jure*.

(a) Subsequent treatment of the area

According to historian Laurence M. Hauptman, who has been employed as a historical consultant by several tribes including the Wisconsin Oneidas, "[t]he process

of Oneida dispossession and removal had been set in motion as early as the end of the American Revolution . . . ." Laurence M. Hauptman, Conspiracy of Interests 57 (1999) (Dkt. 74-5 at 29).[16] Hauptman identifies a number of factors that contributed to the removal of the Oneidas:

- Hopeless division among the Oneidas (*id.* at 28);
- A "flood of settlement into their central New York State homeland" (*id.* at 27);
- A "vast conspiracy of interlocking forces—land and transportation interests," which led to the development of canals (including the Erie Canal), railroads and roads (*id.* at 26);
- National security concerns and forty years of tension and wars with Great Britain which had a goal of removing Indian tribes from New York State (*id.* at 21-24);

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16. Excerpts from "Conspiracy of Interests" were submitted as Exhibit C to the Affidavit of David M. Schraver dated November 10, 2000 in the *Sherrill* action, *Oneida Indian Nation v. Sherrill*, Index No. 00-CV-223 and resubmitted as part of Exhibit A to the Affidavit of David M. Schraver dated August 3, 2005 in the district court in *Oneida Indian Nation v. Madison County*, Index No. 00-CV-506. The August 3, 2005 Schraver Affidavit is identified as item # 74 on the district court docket sheet. All citations to this document and other materials included in Exhibit A to the August 3, 2005 Schraver Affidavit will read "Dkt. 74-__ at __."

- The federal government's failure to carry out its fiduciary responsibilities to the Indians (*id.* at 26).

The area from which the Oneidas removed was located within both Madison County (created in 1806) and Oneida County (created in 1798). As Oneida lands were transferred to New York State, they were surveyed and laid out in townships, which were in turn subdivided into sections and the sections into lots. These towns included Cazenovia, Fenner, Lenox, Smithfield, Stockbridge and Sullivan in Madison County and Augusta, Vernon and Verona in Oneida County. The townships were settled by non-Indians, who started churches and schools; set up banks, factories, mills and shops; established local governments, courts, post offices, police forces and fire departments; organized bands, professional societies, seminaries and fraternal societies; and by 1880 covered the area with non-Indian culture. (Dkt. 74-6 at 9 – Dkt. 74-10 at 17).

By 1890, the small remnant of Oneidas who had not removed were living among their non-Indian neighbors "off reservation." (Dkt. 74-5 at 15, 16). At all times since, the area has been treated as non-Indian except for a thirty-two acre parcel currently under BIA jurisdiction, title to which is recorded in the name of an individual Oneida Indian. (Dkt. 74-10 at 19-21). *See Sherrill*, 544 U.S. at 207, 211 n.3.

(b) Established jurisdictional patterns and justifiable expectations

First officially published in 1941 (although not widely available to the public until 1942) under the authority

of the Department of the Interior, Felix S. Cohen's Handbook of Federal Indian Law was updated and republished in 1958, 1982 and 2005 ("Cohen"). In the 1942 edition, Cohen reported that "[t]he State of New York has for 100 years or more legislated for and dealt with the Indians within its borders." Felix S. Cohen, Handbook of Federal Indian Law 419, n.22 (1942). In the chapter on New York Indians, Cohen did not even include the Oneidas in his discussion of "[t]he present status of tribal government." The reason is found in a footnote:

> The Oneidas also, by various treaties, sold all of their land, except about 350 acres, to the State, and removed to the reservation in Wisconsin procured from the Menominees by treaty with the Federal Government. The 350 acres in New York belonging to the Oneidas have long since been divided in severalty under State laws, and as a tribe these Indians are known no more in that State.

Felix S. Cohen, Federal Indian Law 966-67, n.1 (1958) (internal quote omitted); Dkt. 74-10 at 29-30; *see also* Dkt. 74-12 at 31-32.

The same conclusion had been reached by a federal court decades earlier in *United States v. Elm*, Case No. 15,048, 1877 U.S. Dist. LEXIS 44 (N.D.N.Y. Dec. 24, 1877):

> By treaties between the United States and the Six Nations, the Menomonies, and Winnebagoes in 1831 and 1838 the Six Nations acquired extensive cessions of lands in

> Wisconsin near Green Bay; and about that time the main body of the Oneidas removed to these lands. Since then, the tribal government has ceased as to those who remained in this state. . . . The 20 families which constitute the remnant of the Oneidas reside in the vicinity of their original reservation. They do not constitute a community by themselves, but their dwellings are interspersed with the habitations of the whites. In religion, in customs, in language, in everything but the color of their skins, they are identified with the rest of the population.

1877 U.S. Dist LEXIS at *8-10.

Beginning in the second half of the nineteenth century, the established jurisdictional patterns in central New York were non-Indian. "[A]s a tribe [the Oneidas] are known no more in that State." Cohen (1958) at 966-67 n.1; *see also* Dkt. 74-10 at 29-30. In short, the jurisdictional patterns and justifiable expectations in the area are that the ancient state reservation was long ago disestablished or diminished.

(c) Changes in the demographics of the area

The demographics of the area changed dramatically in the decades before and after 1838. As the flood of non-Indian settlers increased, the removal of the Oneidas continued. Demographic changes are reflected in the 1870 and 1890 Censuses of Oneida and Madison Counties. (Dkt. 74-11 at 4, 13; Dkt. 74-5 at 15). By 1890,

there were 106 Oneidas living off-reservation in the area. (Dkt. 74-5 at 15). This number of Oneidas compared to 1890 populations of 42,892 in Madison County, and 122,922 in Oneida County. (Dkt. 74-11 at 24, Dkt. 74-10 at 5).

As noted in *Sherrill*, according to the 2000 census, over 99% of the population in the area is non-Indian. 544 U.S. at 211.

(d) Maps

The map of New York in *The Six Nations of New York 1892 United States Extra Census Bulletin* shows all the reservations of the Six Nations in the State, and there is no Oneida reservation. (Dkt. 74-5 at 17). The absence of an Oneida reservation is confirmed by maps issued by the United States Geologic Survey in the Department of Interior. Neither the Oneida map from the Edition of 1902 nor the Utica map from 1985 shows any Oneida reservation. By comparison, the Tully map from the Edition of 1900 and the South Onondaga map edited in 1973 both show the Onondaga Indian Reservation. (Dkt. 74-11 at 34-37). Maps of Madison County and the towns within the area of the former Oneida reservation from the 1875 Atlas of Madison County make no reference to the Oneida reservation. (*Id.* at 14-20).

The Counties acknowledge that some maps of Madison and Oneida Counties include the words "Oneida Reservation" across unbounded areas. (Dkt. 74-12 at 3-4). However, the area of the former Oneida reservation is overlaid with substantial detail of non-Indian

development, settlement, subdivisions, surveys, and local governments. General references to "Oneida Reservation" on maps, without more, have "limited interpretive value" and "cannot be said to be a considered jurisdictional statement regarding the specific status of . . . Indian lands." *Yankton Sioux Tribe*, 188 F.3d at 1029 n.11 (citations omitted).

(e) Administrative documents

The Acts of Congress and the 1838 Treaty of Buffalo Creek demonstrate the Federal Government's intent to remove the Oneidas from New York and to disestablish (or at least diminish) the Oneida reservation. In addition, the 1892 Census Bulletin (Dkt. 74-5 at 12-17) and administrative documents confirm that the Oneida reservation in New York was disestablished or diminished:

- *1877* Annual Report of the Commissioner of Indian Affairs for the Year 1877 referring to "their former reservations in the counties of Oneida and Madison." (Dkt. 74-12 at 7).

- *1891* Annual Report of the Commissioner of Indian Affairs 1891:

> The Oneida Indians have no reservation, their lands having been divided in severalty among them by act of the legislature many years ago.

* * *

> The Oneida have no tribal relations, and are without chiefs or other officers. (*Id.* at 14).

- *1893* Annual Report of the Commissioner of Indian Affairs 1893. "[The] Oneidas have no reservation. Most of that tribe removed to Wisconsin in 1846. The few who remained retained 350 acres of land . . . divided in severalty among them and they were made citizens." (*Id.* at 16).

- *1900* Annual Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1900, Report Concerning Indians in New York:

> The Cayuga and Oneidas have no reservations. A few families of the latter reside among the whites in Oneida and Madison Counties, in the vicinity of the Oneida Reservation, which was sold and broken up in 1846, when most of the Oneida removed to Wisconsin. (*Id.* at 19).

The 1901 Annual Report is to the same effect. (*Id.* at 21-24). And the 1906 Annual Report states, "[t]he New York Oneida have no reservation: in fact can hardly be said to maintain a tribal existence." (*Id.* at 26).

A letter from the Assistant Commissioner of Indian Affairs dated March 14, 1924, referring to the 1920 decision of the Second Circuit in *United States v. Boylan*, 265 F. 165 (2d. Cir. 1920)[17] advised:

> So far as this Office is aware, there is but little, if any, merit in the legal claim of the Six Nations against the State of New York for lands heretofore conveyed for valuable considerations to that State by the Oneida tribe.

(Dkt. 74-12 at 33-34).

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17. In *United States v. Boylan*, 256 F. 468 (N.D.N.Y. 1919), *aff'd* 265 F. 165 (2d Cir. 1920), *appeal dismissed*, 257 U.S. 614 (1921)), the district court dealt with the thirty-two acres in Madison County currently under the jurisdiction of the Bureau of Indian Affairs ("BIA"). In fact, the *Boylan* decisions recognize that the Oneida Reservation had been reduced (or diminished) and recognize that "the right was given to the Indians as a tribe to dispose of their lands in the state of New York, if they decided to move to Green Bay and there accept other lands allotted to them. After this, the Indians remaining held a single and undivided tract out of the original Oneida reservation." 265 F. at 167. The District Court's opinion in *Boylan* indicates that as of 1906, "the Oneida reservation still existed, although reduced in area." 256 F. at 481. Thereafter in the treaty of 1842, as authorized by the 1838 Treaty of Buffalo Creek, the State arranged to purchase the portion of the reservation that represented the equitable share of the Oneidas who emigrated to Green Bay in 1842. 265 F. at 168. Thus, the court recognized the effect of the treaty of 1842 as further diminishing the Oneida reservation. The *Boylan* case does not support the continued existence of the ancient Oneida Reservation acknowledged in the 1794 Treaty of Canandaigua, although it helps to explain why the thirty-two acres is currently under BIA jurisdiction.

A letter from the Assistant Commissioner of Indian Affairs dated January 7, 1925 stated:

> "Furthermore, the Oneida Indians years ago disposed of their lands in New York State and removed to a reservation in Wisconsin. As a tribe these Indians are no longer known in the State of New York." (*Id.* at 35).

Three 1939 letters confirm that the Oneida Reservation no longer exists. (*Id.* at 37-39). And more recently, the Annual Report of Indian Lands, U.S. Department of the Interior, Bureau of Indian Affairs, Table of Lands under the Jurisdiction of The Bureau of Indian Affairs as of December 31, 1997 shows no land in Oneida County, New York and only thirty-two acres in Madison County, New York. *Annual Report of Indian Lands*, U.S. Department of the Interior, Bureau of Indian Affairs (Dec. 31, 1997) available at http://web.archive.org/web/20011126092759/www.doi.gov/bia/realty/cnty97.pdf, at 12.

Except possibly for the thirty-two acres, there has been no Oneida reservation for over one hundred years; and the area has been under non-Indian jurisdiction for nearly 200 years.

E. The Court of Appeals' Conclusion That The Oneida Reservation Was Not Disestablished Or Diminished Is Historically Inaccurate and Legally Unsound.

The court of appeals did not read the historical record as this Court did in *Sherrill*, and its conclusion

that the Oneidas' 300,000-acre reservation was left undiminished is factually and legally unsupportable. As an initial matter, it dismisses the sale of 295,000 acres (and influx of non-Indians) in the 40 years before the 1838 Treaty, believing what happened to the Oneida reservation before 1838 "is not persuasive evidence that the Buffalo Creek Treaty was meant to disestablish the reservation." 337 F.3d at 164. But the premise for the 1838 Treaty was that the Oneidas had sold almost all of their reservation lands to New York State in treaties facilitated, approved, or condoned by the federal government (*see Sherrill*, 544 U.S. at 205-06; *Oneida Indian Nation*, 43 Ind. Cl. Comm. at 385-395); were on the verge of losing the remaining 5,000 acres due to the irresistible forces of settlement and development in the 1800s; and the federal government could entice the Oneidas to leave by offering them a permanent home west of the Mississippi where they would be undisturbed. 43 Ind. Cl. Comm. at 391-403. If the 295,000 acres of land next door to the 5,000 acres were still part of an undiminished Oneida reservation in 1838, the United States would not have needed to remove the Oneidas to a location half a continent away.

The court of appeals' conclusion also rests in part on a misreading of the 1838 Treaty. As an initial matter, the court of appeals curiously concluded that the 1838 Treaty did not apply to the Oneidas in New York because they had "a permanent home" within the meaning of Article 2 of the 1838 Treaty. 337 F.3d at 161, n.17. But that Article in relevant part states the Treaty will provide "a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have

no permanent homes." JA211a. The phrase "who have no permanent homes" applies equally to Oneidas in New York, Wisconsin or elsewhere in the United States. With that universal application, there is no justification in the record, or explanation by the court of appeals, as to why New York Indians residing in New York had a "permanent home," but those residing in Wisconsin (pursuant to prior federal treaties) or elsewhere in the United States did not.

Moreover, the court of appeals' conclusion is belied by the terms of Article 13 which specifically call for the "Oneidas residing in New York" "to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida" (JA218a) as well as Articles 2 and 5 which reinforce the New York Oneidas' agreement to remove to "their lands in the Indian territory." The great majority of Oneidas in New York sold their property and removed to the west, as understood and agreed.

Because most New York Oneidas actually sold their lands in New York and removed from New York, as understood and agreed in the Treaty, the declaration of Commissioner Ransom Gillett, reporting that some New York Oneidas were told they did not have to leave New York (337 F.3d at 161-62), is of no legal consequence. Moreover, Gillett's declaration, executed after the 1838 Treaty was signed, conflicts with the plain language of the Treaty and, even if given effect, applies only to the remaining Oneida lands as of 1838 and not to lands sold in the previous forty years through the collaboration of New York State and the federal government.

Furthermore, President Van Buren and other administration officials charged with implementing the federal removal policy certainly intended the Oneidas' reservation in New York to be diminished (if not disestablished) as the New York Oneidas sold their lands and left the State. In a report to Congress less than a year after obtaining the Oneidas' consent to the amended treaty, the Commissioner stated that although individual members of certain tribes could remain on unsold land during their lifetime, "[t]he rising generation, however, would not be embraced in the provisions of that proposition and would have to seek homes in the new country." JA193a.

The court of appeals also emphasized that "[t]here is no specific cession language, and no fixed-sum payment for opened land in New York . . . ." 337 F.3d. at 161. The court of appeals described the removal terms in Article 13 as "speculative future arrangements with . . . New York's governor" and observed that the "President had never fixed a time for . . . removal." *Id.* The court of appeals cited a federal surplus land act case, *Mattz v. Arnett*, 412 U.S. 481 (1973), to support the probative value of specific cession terms, noting that such language "can be helpfully probative, *particularly when buttressed by fixed compensation for the opened lands.*" 337 F.3d at 159 (emphasis added). But in *Mattz* and every other surplus land act case, the court addressed a federal statute that opened up a reservation on federal lands and had to determine whether Congress had intended to disestablish an Indian reservation when it enacted the statute.[18] In that separate context, Congress can set forth specific cession and compensation terms because the reservations were

created on federal public lands, and upon being opened, the United States held the right to purchase the land. No such terms could be included in the 1838 Treaty because the Oneida reservation was initially State-created and New York held the right of preemption. *See supra* Part II.C.

Because New York State—and not the federal government—held the right to purchase the land from the Oneidas, the language of the 1838 Treaty was necessarily different from surplus land act cases involving Western tribes. The most that the United States could require of the Oneidas was that they "make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." JA218a.

The court of appeals' pre-*Sherrill* analysis rests on a misreading of history, the 1838 Treaty, and the applicable law regarding disestablishment and diminishment. The historical record shows the Oneidas "ancient" and "former" reservation was substantially diminished, if not disestablished, by the mid-nineteenth century. This Court should recognize that historical reality, rather than perpetuate a disruptive legal fiction that a "not-disestablished" reservation spans 300,000 acres (approximately 450 square miles) across central New York.

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18. Congress, in passing surplus land acts, was not implementing any policy to remove the Indians on the reservation. Rather, the tribes all remained on the land but with reduced land holdings. In that peculiar setting, Congress might or might not intend to diminish or disestablish the reservation.

CONCLUSION

The judgment of the court of appeals should be reversed. This Court should hold that tribal sovereign immunity from suit does not bar tax foreclosure and eviction to collect lawfully-imposed property taxes on land owned in fee by an Indian tribe, and that the ancient Oneida reservation in New York has been disestablished or diminished to thirty-two acres.

Respectfully submitted,

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ADDENDA

ADDENDUM A — EXCERPTS FROM JOINT APPENDIX IN THE SUPREME COURT OF THE UNITED STATES IN *COUNTY OF YAKIMA v. CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION*, OCTOBER TERM, 1990

Nos. 90-408 and 90-577
CONSOLIDATED

In The
Supreme Court of the United States
October Term, 1990

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Petitioner,

v.

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals For the Ninth Circuit

JOINT APPENDIX

Addendum A

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PETITIONS FILED: 90-408, SEPTEMBER 5, 1989
AND 90-577, OCTOBER 3, 1990
CERTIORARI GRANTED APRIL 29, 1991

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COMPLAINT FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF IN *CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION v. COUNTY OF YAKIMA*, NO. C-87-654 (E.D. WASH) DATED NOVEMBER 6, 1987 FILED NOVEMBER 9, 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-87-654-AAM

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA NATION,

Plaintiff,

vs.

COUNTY OF YAKIMA and DALE A. GRAY, Yakima County Treasurer,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF

[Filed Nov. 9, 1987]

COMES NOW the plaintiff and for cause of action against the defendants, alleges as follows:

PARTIES

I.

Addendum A

Plaintiff is a federally recognized Indian Nation pursuant to the *Treaty with the Yakimas*, 12 Stat. 951. Plaintiff brings this action on its behalf as a sovereign, tribal entity and on behalf of its members who reside within the exterior boundaries of the Yakima Indian Reservation. Plaintiff also brings this action in the place of the United States of America who through the Department of Interior/Bureau of Indian Affairs, regulates and protects the interests of plaintiff and its enrolled members.

II.

Defendant, County of Yakima, is a municipal corporation of the state of Washington. A substantial portion of plaintiff's reservation is located within Yakima County.

III.

Defendant Dale A. Gray is the duly elected treasurer of Yakima County, Washington, responsible for the collection of *ad valorem* property taxes within Yakima County, Washington.

JURISDICTION

IV.

This Court has jurisdiction over this matter and venue is proper pursuant to 26 U.S.C. Sec. 1331 as this action involves a federal question concerning a treaty

made by the United States of America, and pursuant to 28 U.S.C. Sec. 1362 as this matter involves an action by a federally recognized Indian nation.

FIRST CAUSE OF ACTION

V.

Plaintiff is a federally recognized Indian Nation with which the United States of America entered into a treaty entitled *Treaty with the Yakimas*, 12 Stat. 951. In said *Treaty with the Yakimas*, the Yakima Nation reserved from other lands ceded to the United States, lands designated as the Yakima Indian Reservation which is for the exclusive use and benefit of the Yakima Nation and its members. The Yakima Nation also retained its sovereign right to be self-governing and to make and enforce its own laws. Subsequent to said *Treaty with the Yakimas*, the Yakima Nation has maintained its tribal sovereignty and existence and continues to be self-governing, providing essential governmental services to its members and non-members within the exterior boundaries of the Yakima Indian Reservation.

VI.

In connection with its reserved powers of self-government, the Yakima Nation owns and operates a considerable amount of land within the exterior boundaries of the Yakima Indian Reservation. Title to such land is held both in a restricted trust status for the benefit of the Yakima Nation, and in unrestricted fee patent status.

Addendum A

VII.

Defendant Yakima County, by and through defendant treasurer, imposes *ad valorem* real estate taxes under the authority of RCW 84.52.010 *et seq.* Said defendants have been collecting such *ad valorem* taxes under the provisions of RCW 84.56.010 *et seq.*, RCW 84.60.010 *et seq.*, RCW 84.64.010 *et seq.*, and RCW 84.68.010 *et seq.*

VIII.

In addition to imposing *ad valorem* taxes on fee patent land owned by the Yakima Nation, defendants are also imposing *ad valorem* taxes upon fee patent land located within the Yakima Indian Reservation which is owned by enrolled members of the Yakima Nation who have not severed tribal relations.

IX.

The imposition of *ad valorem* property taxes upon fee patent land owned by the Yakima Nation and or its members violates the provisions of Article 26 of the Constitution of the State of Washington. Article 26 of the State Constitution does not permit the State or defendant County to impose *ad valorem* taxes upon real estate owned by the Yakima Nation and or its members on property owned within the Yakima Indian Reservation unless said property is owned by members of the Yakima Nation who have severed tribal relations. The imposition of *ad valorem* taxes by defendants on

fee patent land owned by the Yakima Nation and its members within the Yakima Indian Reservation is therefore, unlawful and illegal.

X.

The imposition of an *ad valorem* tax against the fee patent land of the Yakima Nation and its members intrudes upon and interferes with the ability of the Yakima Nation to make its own laws and govern itself and its members. The United States Congress has not authorized nor consented to the imposition of an *ad valorem* tax on the land of the Yakima Indian Reservation owned by the Yakima Nation and or its members. Therefore, the existing and continuing efforts by the defendants to impose and collect *ad valorem* taxes from the Yakima Nation and its members with regard to fee patent land within the boundaries of the Yakima Indian Reservation is unlawful and illegal.

XI.

The defendants have scheduled a public tax sale of approximately 40 parcels of real estate located within the Yakima Indian Reservation in which the Yakima Nation and or its members have a fee patent interest. Said sale is scheduled for November 20, 1987. Unless said sale is enjoined and restrained by the Court, the plaintiff and its members will suffer irreparable harm.

Addendum A

XII.

Plaintiff is entitled to a judgment declaring that fee patent land located within the Yakima Indian Reservation which is owned by the Yakima Nation and or its enrolled members who have not served their tribal relations within the boundaries of the Yakima Indian Reservation are not subject to State or County *ad valorem* taxes.

SECOND CAUSE OF ACTION

XIII.

Plaintiff realleges Paragraphs No. I through IV and Paragraphs No. V through VI as though set forth herein in full.

XIV.

The Yakima Nation and its enrolled members occasionlly sell fee patent land located within the exterior boundaries of the Yakima Indian Reservation. Defendants impose a real estate excise tax pursuant to the provisions of RCW 82.45.010 *et seq.* upon the Yakima Nation and its members in order to consummate such sales.

XI. [SIC]

The actions of the defendants regarding the imposition of an excise tax on real estate sales under

the provisions of RCW 82.45.010 *et seq.* upon the Yakima Nation and its enrolled members are invalid and illegal as such actions infringe upon the sovereignty of the Yakima Nation and its treaty reserved right to make its own laws and govern its own people. Defendants have no lawful authority to impose or collect said excise taxes. Plaintiff is entitled to a judgment declaring that the sales of fee patent land located within the exterior boundaries of the Yakima Indian Reservation by the Yakima Nation and its members are not subject to the excise tax otherwise imposed by RCW 82.45.010 *et seq.*

WHEREFORE, plaintiff prays for judgment against the defendants as follows:

1. For a temporary restraining order and an injunction against the defendants prohibiting the sale of approximately 40 parcels of real estate in which enrolled members of the Yakima Nation who have not severed their tribal relations have an interest in. [sic]

2. For an injunction against the defendants prohibiting said defendants from the levy, imposition or collection of *ad valorem* taxes upon the fee patent land of the Yakima Nation and its tribal members who have not severed tribal relations within the exterior boundaries of the Yakima Indian Reservation.

3. For an injunction against the defendants prohibiting said defendants from the levy, imposition or collection of the excise tax imposed by RCW 82.45.010 *et seq.*, for sales of real estate located within the exterior boundaries of the Yakima Indian Reservation.

Addendum A

4. For such other and further relief as to the Court seems just and proper.

5. For plaintiff's costs and disbursements incurred herein.

DATED this 6th day of November, 1987.

s/
TIM WEAVER
Attorney for Plaintiff

s/
R. WAYNE BJUR
Attorney for Plaintiff

STIPULATION OF FACTS FOR SUMMARY JUDGMENT IN *CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION v. COUNTY OF YAKIMA*, NO. C-87-654 (E.D. WASH) FILED APRIL 26, 1988

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-87-654-AAM

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA NATION,

Plaintiff,

vs.

COUNTY OF YAKIMA; and DALE A. GRAY, Yakima County Treasurer,

Defendants.

STIPULATION OF FACTS FOR SUMMARY JUDGMENT

[Filed April 26, 1988]

Pursuant to this Court's order of April 11, 1988 herein, the parties agree to and submit for the Court's consideration the following facts relating to benefits (as between State and County government on one hand and Yakima Indian Nation tribal government on the other hand) and to the pattern of fee land ownership within the Yakima Indian Reservation. The parties attorneys have reviewed each other documentary support for the

facts recited herein and find all to be prima facie valid. However, this fact stipulation is only for purposes of the pending cross-motions for summary judgment, as in such cases the facts as presented by non-moving parties are presumed to be true. In the event of a trial of this cause, the parties reserve the right to challenge and require proof of these facts according to applicable discovery and evidence rules.

LANDS, POPULATION AND OWNERSHIP

1. The Yakima Indian Reservation consists of approximately one million, three hundred thousand acres of land, located almost entirely in Yakima County.

2. The Yakima Indian Nation owns some interest in approximately seventy-five parcels of fee-patented land within the Yakima Indian Reservation. Most of these interests are fractional. The total assessed value of the partially tribal owned lands is five million, four hundred four thousand, nine hundred sixty dollars ($5,404,960). The total assessed value of the Yakima Tribe's interest in these lands is one million, two hundred fifty two thousand, seven hundred twenty six dollars ($1,252,726). The sum of ten thousand, seven hundred eighteen dollars and seventy five cents ($10,718.75) in state and local ad valorem taxes was levied by defendant Yakima County against the Yakima Nations share of these lands for the year 1987.

3. The Yakima Indian Nation has 7,604 enrolled members. Approximately 4,500 of these members reside within the boundaries of the Yakim Reservation.

Addendum A

Approximately 104 individual members of the Yakima Nation are known to own a total of 139 parcels of fee-patented land within the Yakima Indian Reservation. Of these 139 parcels, 72 are residential lots whose acreages are not known to the parties. Of these residential lots, 33 are in Toppenish, 17 in Wapato, 14 in White Swan. The remaining 67 parcels comprise a total of 1,335.68 acres, and their total assessed value is $4,580,420. The parties believe most of the individual Yakima Indian owned parcels within the Yakima Reservation have been identified and will jointly advise the Court of others, when identified, if requested by the Court.

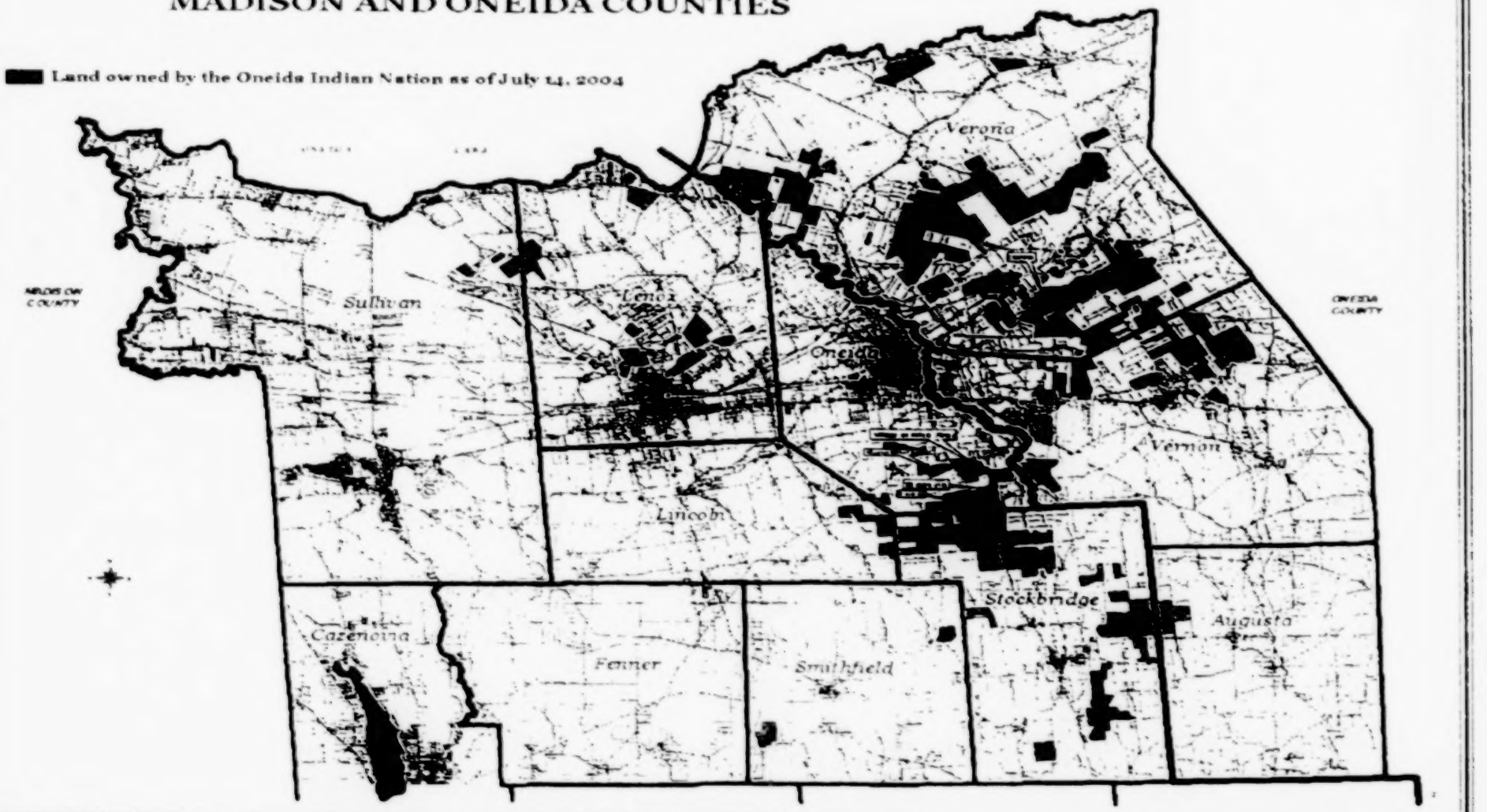
4. A map of the Yakima Indian Reservation is submitted herewith to illustrate the locations of the fee-patented lands referred to herein. This map is marked in blue to indicate the individual Indian owned parcels hereinabove mentioned, in red to indicate those lands above mentioned in which the Yakima Tribe has interests, and the other fee-patented lands within [sic] the Reservation are colored in grey.

5. According to the most recent (1980) U.S. Census Data, the total population of the Yakima Indian Reservation is 25,363. 24,720 of these are from the Yakima County portion of the Reservation and 643 from the Klickitat County portion. The same 1980 Census showed 4,983 Indian inhabitants of the Yakima Reservation, without regard to tribal affiliation, 4,919 of whom are from the Yakima County portion of the Reservation and 64 from the Kittitas County portion.

* * * *

ADDENDUM B — MAP SUBMITTED IN *CITY OF SHERRILL V. ONEIDA INDIAN NATION*, NO. 03-855, AS ATTACHMENT TO AMICI CURIAE BRIEF OF MADISON AND ONEIDA COUNTIES

SELECTED AREAS OF MADISON AND ONEIDA COUNTIES



AMICUS CURIAE BRIEF

11

No. 10-72

Supreme Court, U.S.
FILED
DEC 10 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MADISON COUNTY and
ONEIDA COUNTY, NEW YORK,

Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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THE AMICUS CURIAE SUBMIT THIS BRIEF IN SUPPORT OF PETITIONERS

The California State Association of Counties respectfully submits this brief as *amicus curiae* in support of Petitioners.

INTERESTS OF THE AMICUS CURIAE[1]

The California State Association of Counties (CSAC) is a nonprofit corporation, the membership of which consists of all 58 California counties.[2] As representative of California counties, *amicus* has a compelling interest in Question No. 1, use of tribal immunity as a bar to foreclosure to enforce property tax liens. An appreciable component of the general revenue of California counties is provided by an ad valorem tax imposed on non-exempt real property. In addition, local governments are entrusted with land use authority within their jurisdictions. The Second

[1] The parties have consented to the filing of this brief. This brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amicus curiae* made a monetary contribution to this brief's preparation or submission

[2] CSAC sponsors a Litigation Coordination Program, administered by the County Counsel's Association of California and overseen by CSAC's Litigation Overview Committee. The Litigation Overview Committee, which is comprised of county counsels throughout the state, monitors litigation of concern to counties statewide, and has determined that this case involves an issue affecting all California counties.

Circuit's decision threatens state and local governments' ability to collect taxes and regulate land use on non-reservation property purchased by tribes on the open market.

SUMMARY OF ARGUMENT

The decision of the Second Circuit Court of Appeals legitimates a tribe's sovereign domain over property purchased by the tribe in fee outside its reservation boundaries.[3] The court acknowledged the inherently illogical nature of its decision, but concluded that off-reservation property held in fee is not subject to state and local jurisdiction. The court's concurring opinion put the issue this way:

> The holding in this case comes down to this: an Indian tribe can purchase land (including land that was never part of a reservation); refuse to pay lawfully-owed taxes; and suffer no consequences because the taxing authority cannot sue to collect the taxes owed. This rule of decision defies common sense. But absent action by our highest Court, or by Congress, it is the law.

If upheld, the decision would insulate fee land held by tribes from local government jurisdiction and effectively repudiate the mechanism established by Congress for taking property owned in fee into trust

[3] This brief does not address taxation or regulation of Indian county as defined in 18 U.S.C. § 1151.

for a tribe, thus exempting it from state and local taxation and regulation. 25 U.S.C. § 465 ("section 465"); *see Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 220-21 (2005) ("Section 465 provides the proper avenue for OIN to reestablish sovereign authority over territory").

The Second Circuit's decision is an unwarranted rejection of the reasoning of *Sherrill*, and other opinions of this Court defining limits on tribal authority over non-trust property. *Sherrill* rejected, on equitable grounds, the assertion that ancient sovereignty could be resurrected by purchasing property on the open market. The decision below eliminates the element of ancient sovereignty and allows the purchase alone to effect the "piecemeal shift in governance" decried by *Sherrill*. 544 U.S. at 21.

ARGUMENT

I. THE BREADTH OF THE ISSUE: THE CALIFORNIA EXAMPLE

California is home to 107 federally recognized tribes. With the exception of the unique situation in Alaska with its large number of tribal corporations, California has the largest number of tribes living within its borders of any State in the nation. In addition, according to the Bureau of Indian Affairs Pacific Region, as of August 2010, there are approximately 15,527 total acres pending in 135 fee-to-trust applications in California. This number does not

include land held by tribes in fee where no fee-to-trust application is pending. Clearly, the issue of tribal land owned in fee is significant in this State. Examination of what is occurring with tribal fee land in California provides this Court with an important context to consider the legal issues presented by this case.

Interactions between counties and tribes related to activities on fee land occur regularly throughout California. While it is beyond the scope of this brief to detail each such instance, the County of Amador provides a prime example. Located in the foothills and Sierra Nevada Mountains, the County has a population of less than 40,000 residents. Despite its small size, it is home to a large Indian Casino and Resort; two additional resorts are in the planning stages. One of the planned gaming projects will be situated on a 67.16 acre parcel which is owned in fee by the Buena Vista Rancheria of Me-Wuk Indians tribe. The tribe formally requested the Department of Interior to take this parcel into trust, but the Department has refused to do so. Although the land is merely held in fee, the tribe has declined to pay ad valorem real property taxes on this parcel. Indeed, the tribe has advised the County, in writing, that it refuses to pay the unpaid taxes. The County has filed multiple tax assessments totaling $13,627.45 against the property. The assessments remain delinquent.

The County of San Diego also has a significant interest in activities on fee-owned tribal land. The County consists of 4,281 square miles in the southern

part of the State, and contains 18 reservations with 17 tribal governments, more than any other county in the nation. Currently, 128,205 acres are held in trust for tribes in San Diego County. Importantly, another 7,811 acres are owned by tribes in fee. Since 2000, the Department of the Interior has granted 16 fee-to-trust applications, covering 4,711 acres within the County. An additional 39 applications, encompassing 5,653 acres, are pending. The total estimated annual property tax loss resulting from these 55 applications is $5,599,883.

San Diego County has encountered difficulties with tribes using fee property impermissibly. For example, signs advertising casinos were placed on scenic highways. In another instance, a tribe began using an unpaved lot adjacent to a major highway as a parking lot. This created problems with dust, lighting that violated dark sky regulations, and unsafe ingress and egress. In each of these instances, code enforcement was used effectively to resolve the concerns. As these examples demonstrate, a decision by this Court allowing tribes to raise the defense of sovereign immunity to prevent land use enforcement actions on non-trust lands would create significant health and safety issues.

In the County of Tulare, which is slightly larger in land mass than San Diego County, but has a significantly smaller tax base, the Tule River Indian Tribe has 961 acres currently subject to fee-to-trust applications. One of these parcels is 878 acres and is currently used by the tribe as grazing land. The tribe

has applied to the county for a special use permit to construct a wastewater treatment plant on the parcel. Under the theory of the Second Circuit's decision, if the tribe were to construct the wastewater treatment plant on its fee-owned property without the requisite county permits and approvals, Tulare County could impose fines and penalties for the violations, but could not take any measures to collect those fines to ensure compliance with its land use regulations and safety requirements.

Similarly, Sonoma County which consists of 1,598 square miles in Northern California is home to five federally recognized tribes. Two tribes hold land in fee, these parcels total approximately 200 acres, including sensitive wetland and oak woodland areas. The tribes have considered large housing developments and commercial projects on these lands, which present significant risks to the sensitive resources and are inconsistent with the County General Plan. If County jurisdiction essentially could be usurped through advancement of sovereign immunity defenses in enforcement actions, it would create a regulatory hole where neither state nor federal jurisdiction effectively applied.

As these examples illustrate, the implications of this case go far beyond a tax dispute between one tribe and two counties in New York State. Indeed, this case will impact many thousands of acres of tribe-owned fee land in California and across the nation, potentially threatening tens of millions of dollars of ad valorem taxes and the essential services

they fund. As further explained below, extension of the Second Circuit's opinion would raise critical questions about the ability of local governments to exercise their historic police powers to regulate land use, an important function of protecting the health and welfare of county residents.

II. THE SECOND CIRCUIT'S DECISION JEOPARDIZES THE COLLECTION OF PROPERTY TAX AND THE ENFORCEMENT OF LAND USE REGULATIONS

Exact figures are not available, but with well over 15,000 acres of land owned by tribes in fee in California, the fiscal and regulatory impact on local governments of shielding such property from tax collection and regulatory enforcement are tremendous. The Second Circuit's decision, if allowed to stand, would effectively remove tribal fee land from the property tax rolls, and raise questions about enforcement of land use regulations. As referenced above, the fiscal impact of such a step in San Diego County alone would be nearly $6 million. Multiplied by the total number of acres owned in fee statewide, the fiscal impact on counties in California, which are already facing a collective fiscal crisis, is significant.

A. California's Property Tax Scheme

State property taxes fund essential services, such as police and fire protection, libraries, parks, and municipal planning. In California, the procedures for

assessing and collecting the property tax are established by the State Constitution and state statutes. Taxes are assessed annually. Cal. Const. Arts. 13, 13A; Cal. Rev. & Tax. Code §§ 405, 1817. The obligation to pay the assessed amount is secured by a lien on the property. Cal. Rev. & Tax Code § 2187. The imposition of personal liability for the payment of property taxes is generally prohibited.[4] *Atchison, Topeka & Santa Fe Ry. Co. v. Reclamation Dist. No. 404*, 173 Cal. 91, 92-93 (1916). Thus, the remedy for nonpayment is normally foreclosure of the lien.

California uses a non-judicial process of foreclosure. Failure to pay property taxes results in a declaration of default. Cal. Rev. & Tax. Code § 3371, subd. (a). The declaration starts the period of redemption, typically five years for residential and three years for nonresidential commercial property. Cal. Rev. & Tax. Code § 3361, subd. (a), (c). If the tax remains unpaid after expiration of the redemption period, the tax collector is empowered to sell the property at public auction to satisfy the lien. Cal. Rev. & Tax. Code § 3691, subd. (a)(1)(A). Upon sale, the tax collector executes and records a deed in favor of the purchaser. Cal. Rev. & Tax. Code §§ 3708, 3708.1.

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[4] There are exceptions to this general rule when the value of the property is insufficient to secure the lien, or the property is transferred to a government agency. Cal. Rev. & Tax. Code §§ 134, 2921.5, 2951.

B. Land Use Regulation

Comprehensive and consistent planning and zoning processes are essential to the growth and maintenance of communities. It has long been recognized that counties and cities may validly exercise their police power through zoning and land use regulations. *Euclid v. Amber Realty Co.*, 272 U.S. 365, 386-95 (1926) (zoning ordinance cannot be declared unconstitutional unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare"); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (police power "not confined to elimination of filth, stench, and unhealthy places," but may be used to establish "an area of sanctuary for people"). Zoning and regulatory controls protect the interests of all landowners in a given area. *See Sherrill*, 544 U.S. at 219-20.

Enforcing land use regulations and ensuring compliance with conditions imposed in permits or development approvals depends upon the ability of local governments to assert jurisdiction over the property. In California, infractions of local ordinances or codes are punishable by fines. Cal. Gov. Code § 36900. Counties are also permitted to adopt ordinances that subject any person who violates an ordinance to an administrative fine or penalty. Cal. Gov. Code § 53069.4. If enforcement fines and fees are not paid within 45 days, counties can impose a lien against the property that is the subject of the enforcement activity. Cal. Gov. Code § 54988.

In the decision below, the Second Circuit found that taxes could be imposed on fee land, but could not be collected through *in rem* proceedings. By analogy, if fines for land use violations can be imposed on tribal land owned in fee, but cannot be collected through the lien process, there would effectively be no way for a local government to assert its traditional land use authority over this land. As such, the reasoning of the Second Circuit's decision goes beyond creating a tax exempt status for land owned in fee by tribes; it could also be used to permit such fee land to be effectively immune from land use controls.

III. THE DECISION BELOW WOULD ENCOURAGE DISREGARD OF THE FEE-TO-TRUST PROCESS

The Second Circuit's reasoning would render section 465's fee-to-trust provisions largely superfluous. 25 U.S.C. § 465. That section authorizes the Secretary of Interior ("Secretary") to place land owned by a tribe into trust for the benefit of the tribe.[5] *Id.* Taking property into trust results in its being exempt from state and local taxation and land-use regulations. *Id.*; *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998); 25

[5] The statute also authorizes acquisition of property for an individual Indian. An individual may not assert sovereign immunity. *See Puyallup Tribe, Inc. v. Dept. of Game of State of Wash.*, 433 U.S. 165, 171 (1977) Therefore, this discussion is limited to property owned in fee by a tribe.

Code Fed. Regs. § 1.4, subd. (a). As the Court recognized in *Cass County*, "Congress has explicitly set forth a procedure by which lands held by Indian tribes may become tax-exempt. It would render this procedure unnecessary, as far as exemption from taxation is concerned, if we held that tax-exempt status automatically attaches when a tribe acquires reservation land." *Id.* The concern is potentially greater for fee land outside reservation, given the justifiable expectations of local governments and their residents that municipal laws will apply.

The established fee-to-trust process ensures an evaluation of potential impacts to local agencies and neighboring property owners. *See, e.g.*, *State of South Dakota v. U.S. Dept. of the Interior*, 423 F.3d 790 (8th Cir. 2005), *cert. denied*, 594 U.S. 813 (2006) (state, city and county challenged grant of trust status; court determined that "the Secretary reasonably and appropriately evaluated the relevant factors"). The criteria to be considered by the Secretary in evaluating requests for the acquisition of land in trust include "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls" and "potential conflicts of land use." 25 Code Fed. Regs. §§ 151.10, subd. (e), (f), 151.11(a). Local governments have the opportunity to provide written comments "as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." 25 Code Fed. Regs. § 151.11, subd. (d). As the distance between the tribe's reservation and the land to be acquired

increases, the Secretary "shall give greater weight" to the local governments' concerns. 25 Code Fed. Regs. § 151.11, subd. (b).

Yet the Second Circuit's decision essentially bypasses these safeguards of local governments' concerns by providing the same protection to tribally-owned fee land as to the trust land that has gone through the fee-to-trust procedure. If the fee-to-trust procedure can be avoided simply by the assertion of sovereign immunity on fee land, there need be no consideration of the potential impact on local governments. Mere purchase of property in fee would be sufficient to obviate taxes and land use regulations.

Environmental factors might also be ignored. The National Environmental Policy Act (NEPA) directs federal agencies to consider the environmental impacts of their decisions. 42 U.S.C. §§ 4321 *et seq.* NEPA applies to decisions to take property into trust under section 465. *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 27-28 (D.C. Cir. 2008) (Bureau of Indian Affairs prepared an environmental assessment which "analyzed the effects the proposed casino would have on area wildlife, air and water; farming in the vicinity; and nearby communities"). An environmental analysis under NEPA may lead to mitigation of adverse environmental impacts. *Id.* (proposed mitigation measures sufficient to allow a finding of no significant impact).

By entrusting the fee-to-trust decision to the Secretary, Congress expressed its intent to require

informed oversight of not just the process, but the wisdom of the decision itself. This oversight would be eliminated if the Second Circuit's decision were to stand.

IV. THE SECOND CIRCUIT'S DECISION IGNORES ESTABLISHED LIMITS ON TRIBAL JURISDICTION

If allowed to stand, the decision below would indirectly empower tribes to exercise land use authority they cannot exercise directly. The scope of the power of an Indian tribe to regulate property within a reservation owned in fee by a non-Indian was addressed in *Montana v. United States*, 450 U.S. 544 (1981). In that case, the Crow Tribe of Montana claimed to have authority to prohibit hunting and fishing by nonmembers on property inside the reservation boundaries owned in fee by non-Indians. *Id.* at 547. The Court rejected the argument that the tribe's inherent sovereignty conferred such authority even within the reservation. *Id.* at 563-64.

Relying on earlier decisions, including *United States v. Wheeler*, 435 U.S. 313 (1978), the Court described the limitations on a tribe's sovereignty. *Montana v. United States*, 450 U.S. at 564. The Court concluded: "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.* There

has been no congressional delegation to exempt fee-owned land outside a reservation from state or local jurisdiction. Instead, Congress, through section 465, expressed its intent that the decision to exempt property owned by a tribe from state and local jurisdiction would be made by the Secretary. Permitting an end run around the fee-to-trust decision process would effectively extend tribal power beyond the limits described in *Montana*.

The two exceptions to *Montana*'s general principle – that tribal sovereignty over external relations was divested – were the subject of *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). Neither exception applies here. The first exception, which allows tribal regulation of activities of nonmembers who enter into consensual relationships with the tribe, is not relevant. *Id.* at 428. The Court's discussion of the second exception provides guidance in this case.

Under the second *Montana* exception, a tribe "'may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" *Id.* The Ninth Circuit had premised its decision, upholding tribal zoning authority over land within the reservation, on the second exception. The Court rejected the Ninth Circuit's approach, which "equated an Indian tribe's retained sovereignty with a local government's police power"

as being "contrary to *Montana* itself." *Id.* at 28-29. It would, therefore, be illogical and a perversion of *Montana* to impliedly confer police power on a tribe outside its reservation.

The *Brendale* Court also noted the potential chaos that would result if regulatory authority fluctuated with the owner's use of the land. *Id.* at 429-30. The same threat would exist if regulatory authority were dependent upon the identity of the land owner. A municipality would lose its authority to regulate use of a parcel within its jurisdiction simply by virtue of purchase by a tribe. If the tribe subsequently sold the property, authority would revert back to the local government.

In *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478 (1976), this Court restated its opposition to an "'impractical pattern of checkerboard jurisdiction'" that would occur if regulatory authority were determined on a parcel-by-parcel basis, depending on property ownership. In *Moe*, the question was the state's authority to tax sales transactions and motor vehicle ownership within a reservation. *Id.* at 468-69. The Court rejected the state's assertion of jurisdiction based upon fee ownership of particular parcels of land, noting that Congress had "evinced a clear intent to eschew any such 'checkerboard' approach within an existing Indian reservation." *Id.* at 478-79.

The reasoning of *Moe* applies here. If any tribe's decision to purchase off-reservation property is sufficient to exempt the property from state or local taxation and regulation, the consequence would be much more chaotic than the *Moe*-condemned checkerboard.

CONCLUSION

The court of appeals' decision is irrational and unworkable. The potential consequences threaten vital aspects of state and local jurisdiction. The Court should reverse the decision that sovereign immunity prevents the enforcement of property tax on non-trust land.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 10-72

IN THE

Supreme Court of the United States

MADISON COUNTY, NEW YORK, *et al.*,

Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK,

Respondent,

STOCKBRIDGE-MUNSEE COMMUNITY, BAND OF MOHICAN INDIANS,

Putative Intervenor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR CAYUGA COUNTY AND SENECA COUNTY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Amici will address (i) whether the ancient Oneida reservation in New York was disestablished or diminished, and (ii) whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed property taxes from the Oneida Indian Nation ("OIN"), a successor entity related to the historic Oneidas – the questions presented by Madison and Oneida Counties which this Court has agreed to review via writ of *certiorari*.

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INTEREST OF THE *AMICI CURIAE*[1]

Although the historic boundaries of the Oneidas' 18th century reservation do not lie within Cayuga County or Seneca County, *amici* have a compelling interest in having this Court settle a long-running dispute over the reservation status of ancient tribal land in Upstate New York. The Counties respectfully submit that this Court should clarify the status of the ancient Oneida reservation to provide guidance to other litigants. Uncertainty about the status of ancient Indian reservations in Upstate New York continues to cause conflict between Indian and non-Indian communities and affects governmental entities' ability to govern within their borders. Courts repeatedly look to federal law when applying state statutes in order to determine whether subject land constitutes a reservation. Just as the Court of Appeals for the Second Circuit in this case concluded in a footnote that the Oneidas' reservation was not disestablished, the New York Court of Appeals recently reached a similarly flawed result in *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614, 930 N.E.2d 233, (2010), cert. denied, 131 S.Ct. 353 (2010). In that case, the New York Court of Appeals relied on federal law to determine that each of the two parcels of land purchased by the Cayuga Indian Nation after two centuries of non-Indian ownership was located on a federal reservation that had not been disestablished and was therefore exempt from state cigarette sales and

1. This *amici* brief is presented pursuant to this Court's Rule 37.4; the Counties' authorized law officers appear as co-counsel and have submitted this *amici* brief for the Court's consideration.

excise taxes. The historical record is clear, however, that the ancient Indian lands in Upstate New York were never federal reservations or, in any event, were disestablished centuries ago. Given the widespread confusion and uncertainty causing these conflicts, this Court should settle the issue and hold that the OIN's claim to a "reservation" fails.

The Court should also decide that even if the ancient reservations in Upstate New York have not been disestablished, governmental entities such as Madison and Oneida Counties may foreclose on properties owned by tribal groups if those groups fail to pay lawfully owed property taxes. This Court's decision in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), unquestionably holds that such taxes are owed on lands that an Indian tribe purchases on the open market – and the Second Circuit does not dispute this – but the Second Circuit's decision leaves Madison and Oneida Counties, as well as *amici*, with no remedy to enforce such tax obligations. Without a decision from this Court that Madison and Oneida Counties and *amici* may foreclose on properties for failure to pay property taxes, *Sherrill* is rendered meaningless and Indian groups will continue to ignore their tax obligations.

ARGUMENT

POINT I

THE COURT SHOULD RULE THAT ANY ONEIDA RESERVATION THAT MAY HAVE EXISTED HAS LONG BEEN DISESTABLISHED.

A. Even if the Court finds in favor of Madison and Oneida Counties on the foreclosure issue (discussed *infra*), the reservation status issue warrants review.

Presented with the question of whether the Oneida reservation was disestablished, the Second Circuit below stated that "a tribe's immunity from suit is independent of its lands" and therefore held that it need not reach the disestablishment issue. *Oneida Indian Nation of New York v. Madison County and Oneida County*, 605 F3d 149, 157-158 n.6 (2d Cir. 2010). The Second Circuit nevertheless reaffirmed its earlier finding that the Oneidas' reservation was not disestablished and therefore the OIN retains limited rights on this reservation. *Id.* That decision potentially affects the status of hundreds of thousands, if not millions, of acres of ancient land in Upstate New York and the United States.

Amici contend that this Court's decision in *City of Sherrill, New York v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), has been misinterpreted and misapplied by the Second Circuit and other courts in their decisions regarding the "reservation" status of ancient Indian lands. In particular, the New York Court

of Appeals improperly bypassed *Sherrill* in *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614, 930 N.E.2d 233, (2010), cert. denied, 131 S.Ct. 353 (2010), when it in effect held that the Cayuga Indian Nation rekindled long lost sovereignty when it repurchased ancient lands after two centuries of non-Indian ownership and governance. The New York Court of Appeals based its decision on its belief that the lands constituted a "reservation" that had never been formally disestablished. Perhaps evidencing some doubt on its position, the Court of Appeals effectively requested guidance from this Court regarding the reservation status of such lands: "To be sure, the Supreme Court has not yet determined whether parcels of aboriginal lands that were later reacquired by the Nation constitute reservation property in accordance with federal law. Its answer to that question would settle the issue." 14 N.Y.3d at 640, 930 N.E.2d at 247.

Although the arguments of *amici* against the existence of a federal Cayuga reservation in *Cayuga Indian Nation v. Gould* are not identical to Petitioners' arguments here, Cayuga and Seneca counties' concerns regarding the interpretation and meaning of "reservation" and rights associated therewith under federal law are quite relevant. There is no question that the status of the Oneida reservation is an important issue to *amici* and other governmental entities in Upstate New York and the United States. The *amici's* dispute with the Cayuga Indian Nation is but one example that highlights the need for clarification of the status of ancient Indian reservations.

B. There has never been a federal Cayuga or Oneida reservation in Upstate New York.

In *Cayuga Indian Nation v. Gould*, the New York Court of Appeals began its analysis of the history relevant to the purported existence of a federal reservation by discussing the 1794 Treaty of Canandaigua, but, as *amici*[2] argued in that case, one cannot properly analyze whether there ever was a federal reservation without going further back in time. On February 25, 1789, following their migration to Canada, the Cayugas entered into a treaty with New York, the first paragraph of which states: "First: the Cayugas do cede and grant all their lands to the people of the State of New York, forever." The only interest the Cayugas held in any portion of the ceded lands after 1789 was a limited use right granted by the State in the second article of the treaty as it pertained to a 60,000 acre parcel: "Secondly: the Cayugas shall, of the said ceded lands, hold to themselves, and to their posterity, forever, for their own use and cultivation, but not to be sold, leased, or in any other manner aliened, or disposed of to others, all that tract of land, beginning at . . . ." By the express terms of the treaty, the Cayugas ceded their lands to the State, which then granted to the Cayugas a right of "use and cultivation" in the same. Importantly, in the 1789 Treaty, New York State reserved for itself the exclusive right to purchase back the reservation it had created. *See Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 268-69 (2d Cir. 2005).

2. The *amici* here are the governmental employers of those named individuals who were the appellants in *Gould*, the sheriffs and district attorneys of Cayuga and Seneca counties.

The United States Constitution took effect and the United States government began functioning as a federal government on March 4, 1789 – after the 1789 Treaty was signed. *See e.g., Oneida Indian Nation v. New York*, 691 F.2d 1070, 1079 n.6 (2d Cir. 1982). The Articles of Confederation did not prohibit or require the assent of Congress for the transfer of Indian land. *See Oneida Indian Nation of New York v. New York*, 860 F.2d 1145, 1167 (2d Cir. 1988). As a result, at the time of the 1789 Treaty, New York could – and did – lawfully exercise its right to extinguish whatever interests the Cayugas had in the subject land. *See id.* The United States itself put forth this very argument before the American and British Claims Arbitration Tribunal in 1926, and the Tribunal concluded that the 1789 treaty "was made at a time when New York had authority to make it, as successor to the Colony of New York and to the British Crown," and that "[t]he title of New York ... was independent of and anterior to the Federal Constitution." *Cayuga Indian Claims*, 20 Am. J. Int'l L. 574, 590, 591 (Am. & Br. Claims Arb. Trib. 1926).

In *Gould*, however, the New York Court of Appeals held that in the 1794 Treaty of Canandaigua, the United States recognized that the Cayuga Indian Nation possessed a federal reservation. It is respectfully submitted that this holding was incorrect. In fact, the United States merely acknowledged in the Treaty of Canandaigua that the Cayugas had certain rights to the land derived from the 1789 Treaty with New York. The Treaty of Canandaigua did not establish any new rights, much less a federal reservation. Article II of the treaty provides in full:

> The United States *acknowledge* the lands reserved to the Oneida, Onondaga and Cayuga Nations, *in their respective treaties with the state of New York*, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

7 Stat. 44, Art. II (emphasis added). As is apparent from this language, the United States did not purport to reserve any land by virtue of the Treaty of Canandaigua in 1794; it merely "acknowledged" that New York reserved certain rights to the land for the Cayugas after it had extinguished whatever Indian title the Cayugas previously held. Similarly, the United States did not purport to create a reservation by virtue of the Treaty of Canandaigua, but merely acknowledged that the lands constituted a state reservation under the 1789 Treaty with New York and the United States promised not to disturb the Cayugas' use of the land pursuant to that treaty, which of course the United States would have no right to do regardless.

The Treaty of Canandaigua did not convey an interest in land to the Cayugas and did not divest New York of its rights. *See Seneca Nation of Indians v. United States*, 173 Ct. Cl. 917, 922 n.5 (1965) (explaining that the purpose of the Treaty of Canandaigua was to

"reconfirm peace and friendship between the United States and the Six Nations .... [T]here was no purpose to divest New York and Massachusetts of their right, nor was there any purpose to prevent or to supervise sales or transfers of [subject] territory."). The New York Court of Appeals misconstrued the Treaty of Canandaigua because the United States did not have the power to grant or confirm a title to land when the sovereignty and dominion over it had become vested in New York State. *See Goodtitle v. Kibbe*, 50 U.S. 471, 478 (1850) (holding that Congress could not grant an interest in land that belonged to Alabama). After 1789, New York State held the land in fee subject only to limited use rights granted to the Cayugas pursuant to state law. The federal government had no property rights in the lands and could not confer "recognized title" without illegally depriving New York of its property rights.

Although the Supreme Court has not held that the treaty-making power of the United States extends to the divestment of a state's interest in land, it has observed that if such authority were to exist, it must be shown unmistakably in the treaty. *United States v. Minnesota*, 270 U.S. 181, 209 (1926) ("[N]o treaty should be construed as intended to divest rights of property ... unless the purpose so to do be shown in the treaty with such certainty as to put it beyond reasonable question."). The Treaty of Canandaigua makes no mention of an intent to divest New York of its property rights, and there is no historical evidence that the federal government intended the Treaty to divest New York of its interest. Indeed, the language of the Treaty of Canandaigua confirms that the United States explicitly acknowledged New York State's treaty with the Cayugas.

The 1788 Treaty of Fort Schuyler between the Oneidas and New York was virtually identical to New York's 1789 Treaty with the Cayugas. New York purchased all of the Oneidas' lands and granted them land use rights to approximately 300,000 acres. *See Sherrill*, 544 U.S. at 203. The Treaty of Canandaigua did nothing more than acknowledge the 1788 Treaty, and, just as *amici* argued in *Cayuga Indian Nation v. Gould* with respect to the Cayugas, the United States could not and did not convey any interest to the Oneidas by the Treaty of Canandaigua.

If the Treaty of Canandaigua established a federal Cayuga or Oneida reservation, then in so doing the United States violated the Fifth Amendment to the Constitution. The United States' power of eminent domain extends to the taking of state-owned property without the state's consent, but the United States must pay just compensation to the property owner for the property it takes. U.S. Const. amend. V; *see also Block v. North Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273, 291 (1983). A compensable taking occurs "[i]f a government has committed or authorized a permanent physical occupation of [the] property." *Southview Assocs. v. Bongartz*, 980 F.2d 84, 92-93 (2d Cir. 1992). Under this standard, if by the Treaty of Canandaigua the United States had taken New York State's property rights in the subject lands, then New York State would have been entitled to compensation for that taking. No such compensation was ever given. Because compensation was never paid to New York, even if the United States attempted to effect a taking by the Treaty of Canandaigua, it was incomplete and no property interest passed to the Cayugas or the Oneidas.

See United States v. Dow, 357 U.S. 17; 21 (1958) (holding that title does not pass until the owner receives compensation).

C. Any federal reservation that may have existed was disestablished centuries ago.

If it ever existed as a federal reservation, the vast tract of land that the Oneidas now claim remains a federal reservation has long been disestablished or diminished. Circumstances surrounding disestablishment of reservations are central to ongoing disputes between Indian and non-Indian communities, and recurring issues are raised during those disputes. For example, *amici* argued in *Cayuga Indian Nation v. Gould* that if a federal Cayuga reservation were created by the Treaty of Canandaigua, any such reservation was necessarily disestablished when the Cayugas sold to New York State whatever land use rights they had in the subject land. The Cayugas, who resided in Canada or with the Senecas in Western New York, had no interest in retaining the purported reservation land. In 1795 and 1807, after several failed attempts to sell their land to private parties, the Cayugas sold all of their land use rights to New York State. The July 27, 1795 Treaty between the Cayugas and New York State provides:

> [I]t is Covenanted, stipulated and agreed by the said Cayuga Nation that they will sell . . . to the People of the State of New York all and singular the Lands reserved to the use of the said Cayuga Nation . . . to have and to hold the same to the People of the State of New York and to their Successors forever . . . .

The May 30, 1807 Treaty between the Cayugas and New York State, further provides:

> [T]he said Cayuga Nation for and in consideration of the sum of Four thousand eight hundred dollars . . . Do sell and release to the people of the State aforesaid all their right title Interest possession property claim and demand whatsoever of in and to the said . . . Land . . . commonly called the Cayuga Reservations . . . which two reservations contain all the land the said Cayuga Nation claim or have any interest in in this State To have and to hold the said Two tracts of Land as above described unto the People of the State of New York and their Successors forever.

In support of their assertion, *amici* argued that the federal government's involvement in the negotiation, consummation and subsequent implementation of the 1795 and 1807 conveyances constituted federal ratification of those treaties. Not only did federal officials actively participate in the treaty process and attend the negotiations and signing of the 1795 and 1807 treaties, but the federal government distributed New York's payments to the Cayugas. *See Cayuga Indian Nation of New York v. Cuomo*, 730 F. Supp. 485 (N.D.N.Y. 1990) (discussing involvement of federal officials Jasper Parrish and Israel Chapin Jr. in the negotiation and signing of the 1795 and 1807 treaties and Parrish's transmittal of consideration paid by New York State to the Cayugas for the acquisition of the Cayuga land); *Cayuga Indian Nation v. United States*, 36 Ind. Cl.

Comm. 75, 92, 96 (1975) (noting that Parrish and Chapin signed the 1795 treaty and that Parrish attended the signing of the 1807 treaty as the United States Superintendent of Indian Affairs).

In 1910, the United States and Great Britain entered into an agreement to establish an arbitral tribunal to resolve certain claims between the two governments. Among these was a claim by Great Britain on behalf of the Cayuga Indians of Canada, related to New York State's refusal to pay part of the annuity provided for by the 1795 Treaty whereby the State purchased a portion of the Cayugas remaining land. *See Cayuga Indian Claims*, 20 Am. J. Int'l. L. 574, 576 (Am. & Br. Claims Arb. Trib. 1926). The agreement and the list of claims to be resolved were approved by the United States Senate. By this agreement, the United States recognized that the obligations under the 1795 Treaty were enforceable and could be adjudicated in an international forum. In 1926, the American and British Claims Arbitration Tribunal (which included, among the panel members, Roscoe Pound, Dean of Harvard Law School) published its decision requiring the United States to pay $100,000 to Great Britain as trustee for the Canadian Cayugas. *See Id.* at 594. Thereafter, President Coolidge, with the approval of both houses of Congress, included in the federal government's budget the funds required to pay the award. *See Cayuga Indian Nation v. Cuomo*, 730 F. Supp. at 492. By payment of the Tribunal's award, the federal government plainly and unambiguously recognized the 1795 treaty as a valid conveyance and the source of its liability.

Finally, *amici* argued, the Treaty of Buffalo Creek is the ultimate evidence that, at least as of 1838, no federal Cayuga reservation existed. The New York Court of Appeals, citing the Second Circuit's decision in *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 269 n.2 (2d Cir. 2005), noted that that "the Treaty of Buffalo Creek neither mentions Cayuga land or Cayuga title in New York, nor refers to the 1795 or 1807 treaties between New York and the Cayuga." However, the Court of Appeals' conclusion that there is a federal Cayuga reservation which has not been disestablished is illogical. The Treaty of Buffalo Creek confirms the assertion of *amici* that the Cayuga reservation was either never established as a federal reservation or had long been disestablished by the time of the Treaty of Buffalo Creek in 1838. Had there been a federal Cayuga reservation in existence at the time of the Treaty of Buffalo Creek, that treaty would have specifically mentioned any such reservation either as land to which rights were being relinquished or land to which Indians reserved rights. Instead, the Treaty of Buffalo Creek provides for compensation of the Cayugas upon their removal from New York State to the west, and refers to the Cayugas as "friends" of the Senecas.

The Treaty of Buffalo Creek is, of course, much more germane to the case at hand. Much like the Cayugas did in 1795 and 1807, the Oneida Nation sold its land use rights for all but 5,000 acres of the state reservation created by the Treaty of Fort Schuyler. *See Oneida Indian Nation*, 605 F.3d at 152 (discussed *supra*). The Treaty of Buffalo Creek between the United States and a number of New York tribes provided that the Oneidas still residing in New York State in 1838 were to remove

to their new homes in the midwest and make arrangements with the governor of New York State for New York State to purchase the remaining rights the Oneidas had in any lands within New York State. *See* Treaty of Buffalo Creek, art. 13. The Treaty of Buffalo Creek explicitly named the Oneidas and provided for their removal from New York State. The federal government could not have more clearly disestablished anything that may have been left of a purported federal Oneida reservation.

Amici submit that the historical record indicates that there was never a federal Cayuga or Oneida reservation in New York State, and that even if any such reservation ever existed, it has long been disestablished. As long as courts around the country look to federal law to interpret the meaning of the word "reservation" within state statutes, the need for clarity from the highest court as to what constitutes a present-day federal reservation will only grow.

POINT II

THIS COURT SHOULD RECOGNIZE THE RIGHT OF A GOVERNMENTAL ENTITY TO FORECLOSE ON AN INDIAN TRIBE'S PROPERTY IF THAT TRIBE LAWFULLY OWES REAL PROPERTY TAXES BUT REFUSES OR FAILS TO PAY THEM.

Amici also have a compelling interest in having this Court settle the right of a governmental entity to foreclose on properties owned by an Indian tribe if the tribe fails to pay lawfully imposed property taxes. Without such a decision from this Court, *amici* and all other counties are left with the right to *impose* taxes under *Sherrill* but absolutely no remedy to enforce that right. Such an anomaly, which has been created by the Second Circuit's decision below, eviscerates *Sherrill* and must be rectified.

The ability to foreclose on Indian-owned properties is a particular concern to *amici* because the Cayuga Indian Nation has recently begun to purchase properties within the taxing jurisdiction of the *amici*. Further, *amici* have spent significant resources in challenging the Cayuga Indian Nation's application to place portions of its lands into trust with the federal government and to remove the land from the tax payroll. The Cayuga Indian Nation's land into trust applications raise several concerns, not the least of which is a significant detrimental impact on the natural environment. Thus, *amici*, United States Senator Charles Schumer, and many others adamantly argue that the land should not be taken into trust. If the

Second Circuit's decision in this case is not reversed, however, the dispute over the Cayuga Indian Nation's land loses much of its significance. If the Second Circuit's decision stands, even if the land is not taken into trust, the Cayuga Indian Nation may refuse to pay property taxes and there is little or nothing *amici* or anyone else can do about it. Such a result cannot stand under *Sherrill*.

Amici join Madison and Oneida Counties' position that tribal sovereign immunity does not bar *in rem* foreclosure for nonpayment of real property taxes. *Sherrill* makes clear that property taxes are lawfully due on property owned by the OIN in Upstate New York. As this Court held in *Yakima County v. Confederated Tribe of Yakima*, 502 U.S. 251 (1992), the property tax is a burden on the property alone, and an *in rem* foreclosure proceeding, which is directed at the property and not the tribe, is not significantly disruptive to tribal self-government. This Court's sovereign immunity precedents concerning *in personam* actions against tribes have no application to an *in rem* proceeding to collect taxes lawfully owed by a tribe. As Madison and Oneida Counties establish in their brief to this Court, *in rem* tax foreclosure proceedings are directed to the land; the property owner is not a defendant in a foreclosure action. Thus, sovereigns such as foreign nations and the 50 states do not enjoy immunity from *in rem* tax foreclosure proceedings if they purchase land within the taxing and regulatory jurisdiction of another sovereign. There is no basis in law or logic to give quasi-sovereign tribes greater protection from *in rem* foreclosure proceedings than sovereign foreign countries and states.

Thus, *amici* submit that this Court should hold that Madison and Oneida Counties may foreclose on properties owned by the OIN if the OIN fails to pay property taxes. Such a decision is necessary to allow *amici* and other governmental entities to enforce the rights granted to them by this Court's decision in *Sherrill*.

CONCLUSION

For the foregoing reasons, this Court should find in favor of Madison and Oneida Counties and find that the ancient Oneida reservation in New York was never a federal reservation to begin with or was disestablished or diminished and that even if it still exists, tribal sovereign immunity from suit does not bar taxing authorities from foreclosing to collect lawfully imposed property taxes.

Dated: December 10, 2010

Respectfully submitted,

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AMICUS CURIAE BRIEF

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13

No. 10-72

IN THE

Supreme Court of the United States

MADISON COUNTY AND
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v.

ONEIDA INDIAN NATION OF NEW YORK AND
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ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION, CITIZENS EQUAL RIGHTS ALLIANCE AND CENTRAL NEW YORK FAIR BUSINESS AS AMICI CURIAE SUPPORTING PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Citizens Equal Rights Foundation (CERF) (1), Citizens Equal Rights Alliance (CERA)(2) and Central New York Fair Business (CNYFBA) (3), (collectively "the *Amici*"), by their undersigned counsel, respectfully move for leave to file the attached brief as *amici curiae* in support of the Petitioners. The *Amici* have requested and obtained the written consent to file this brief from Petitioners, Madison County and Oneida County.

Consent from Respondent, Oneida Indian Nation (OIN) of New York, was requested by letter to Attorney Michael R. Smith on October 29, 2010. No response has been received. Therefore, this brief is accompanied by a motion requesting that this *amici* brief be filed.

The Petition seeks review of the decision of the United States Court of Appeals for the Second Circuit affirming the judgment of the district court that ruled the "OIN is immune from the Counties' foreclosure actions under the principle that "(a)s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."

The subject of this litigation involves application of federal Indian common law to prevent the collection of property taxes on fee land in state courts.

Moreover, the case concerns the application of this Court's decision in *City of Sherrill v. Oneida Indian*

Nation, 544 U.S 197 (2005). CERF and CERA filed an *amici curiae* brief in the *City of Sherrill* case in support of the City of Sherrill and have continued to have a substantial interest and involvement in the proper application of the decision.

Specifically, the *Amici* have a substantial interest in this litigation for several reasons. The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA), a South Dakota non-profit corporation with members in 34 states. CERF was established to protect and support the constitutional rights of all people, both Indian and non-Indian, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights. CERF has a critical interest in this case, as the extension of the decision of the Second Circuit as precedent will affect CERA members who own various assets and pay property taxes on fee lands near tribal fee property all over the United States. Starting with the *amici curiae* briefs in *City of Sherrill* and *Carcieri v. Salazar*, 129 S.Ct 1058 (2009) (2009) CERF has maintained a consistent position on limiting the Indian Reorganization Act. See http://www.narf.org/sct/sherrill/amiciequalrightsfoundation.pdf and http://www.narf.org/sct/carcieri/merits/cerf_et_al.pdf.

This brief addresses federal Indian common law, tribal sovereign immunity and whether the land is federal Indian country.

The Central New York Fair Business, Inc., incorporated in the State of New York, is headquartered in the City of Oneida. It is the purpose of Fair Business to identify and address significant issues affecting the equality of business opportunity in central New York. Allowing the Oneida Indian Nation to assert sovereign immunity over fee lands to avoid the payment of property taxes will adversely affect all citizens of New York by creating an unequal business advantage and exempting the Oneida Indian Nation (OIN) enterprises from the laws of the State of New York and the regulatory authority of the Counties.

Members of the Central New York Fair Business, Inc., further are resident citizens of Madison and Oneida Counties. They are homeowners and business owners in the area where the parcels at suit are located. They share common roads; common underground water aquifer; and, common streams. They will be impacted as taxpayers by public costs resulting from any proposed use of the parcels made by the OIN, including the impacts of the casino or its expansion. Any proposed use of the parcels by the OIN could affect their property values, character of the community and community safety if the civil and criminal jurisdiction of New York and the Counties are not applicable to the parcels because of tribal sovereign immunity. CERA and CNYFBA are also actual parties in the litigation against the Record of Decision to take most of the parcels of land at issue in the *City of Sherrill* case into trust using 25 U.S.C. § 465 and the Part 151 regulations

Third, the *Amici* are experienced in and have been committed to furthering their interests by filing

amicus briefs in other cases that have dealt with issues similar to those raised in this litigation.

The *Amici* are very familiar with the questions involved in this litigation and have reason to believe that one significant legal question may not be fully addressed by Petitioner. Additional briefing would assist this Court in deciding this case.

The *Amici* have a longstanding commitment to safeguarding the civil rights of all Americans, and have an abiding interest in the welfare of all Americans, including the Oneida Indians of New York. For these reasons, and those set forth in the attached brief, the *Amici* respectfully request leave to file a brief *amici curiae*.

Respectfully submitted,

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12/10/10

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Interest of the Amici Curiae

The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA), a South Dakota non-profit corporation with members in 34 states. CERF was established to protect and support the constitutional rights of all people, both Indian and non-Indian, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights. CERF has a critical interest in this case, as the extension of the decision of the Second Circuit as precedent will affect CERA members who own various assets and pay property taxes on fee lands near tribal fee property all over the United States. Starting with the amicus curiae briefs in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) and *Carcieri v. Salazar*, 129 S.Ct 1058 (2009) CERF has maintained a consistent position on limiting the Indian Reorganization Act (IRA) to only those tribes occupying actual federal Indian reservations in the Western United States. This brief continues the discussion by confronting this Court's creation and use of federal Indian common law to expand the authority of federally recognized Indian tribes.

The Central New York Fair Business Association, Inc., is incorporated in the State of New York and headquartered in the City of Oneida. It is the purpose of Fair Business to identify and address significant issues affecting the equality of business opportunity in central New York. Allowing the Oneida Indian Nation to assert sovereign immunity over fee lands to avoid the payment of property taxes will adversely affect all citizens of New York by creating an unequal business advantage and exempting the Oneida

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Members of the Central New York Fair Business Association, (CNYFBA), further are resident citizens of Madison and Oneida Counties. They are homeowners and business owners in the area where the parcels at suit are located. They share common roads, common underground water aquifer and common streams. They will be impacted as taxpayers by public costs resulting from any proposed use of the parcels made by the OIN, including the impacts of the casino or its expansion. Any proposed use of the parcels by the OIN could affect their property values, character of the community and community safety if the civil and criminal jurisdiction of New York and the Counties are not applicable to the parcels because of tribal sovereign immunity. CERA and CNYFBA are also actual parties in the litigation against the Record of Decision to take most of the parcels of land at issue in the City of Sherrill case into trust using 25 U.S.C. § 465 and the Part 151 regulations.

Madison and Oneida Counties have consented by letter of November 2, 2010 to the filing of this *amici curiae* brief.[1] Consent for filing this *amici* brief by the Oneida Indian Nation was requested in writing on October 29, 2010 from Attorney Michael R. Smith. No response has been received. Therefore, this brief is

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than *amici curiae*, CERF and CNYFBA, its members or its parent CERA's members, or its counsel have made any monetary contribution to the preparation or submission of this brief.

accompanied by a motion requesting that this *amici* brief be filed.

Summary of the Argument

This brief confronts the authority of this Court to continue to create or discover law in regards to Indian tribes. This Court rejected the premise that the federal courts could or should "discover" national or general common law in diversity of citizenship cases in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). Yet 36 years later in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974)(*Oneida I*) this Court through federal Indian common law changed the settled law in regards to the state's authority under the doctrine of preemption as defined in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) where no federal Indian reservation ever existed. This rewriting of the historical development of the law left the State of New York and the Counties of Madison and Oneida virtually defenseless until the doctrine of laches was applied in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). Even after *Sherrill*, the lower courts have continued to use their authority under "federal Indian common law" to reach the erroneous conclusion that the former Oneida reservation is "Indian country." This has reached now all the way into the recent decision of the New York Court of Appeals that applied federal law to determine whether the Cayuga tribe has a reservation as a matter of state law. *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614 (2010). Now, with the recent manipulations of counsel for the OIN regarding the ordinance of November 29, 2010 partially waiving sovereign immunity to attempt to divest this Court of jurisdiction over this case, this territorial tribal

government is threatening to disrupt the actual precept of the rule of law that is the basis of our Constitutional government. The assumption that the historical racial classifications of "Indian" and "Indian tribe" can become an integrated part of our law instead of an application of a completely separate territorial law is erroneous. The special status created through federal treaties and statutes of Indians and Indian tribes does separate the "Indians" and "Indian tribes" from the rest of the state citizenry. This fact has created real discrimination in the enforcement of "Indian" rights against all other property interests of ordinary state citizens and has damaged state sovereignty. This Court made such a decision in *Erie Railroad* in 1938 to protect state sovereignty and equal protection of the law for all individual Americans. This Court needs to do so again by extending the Erie Doctrine into federal Indian law by admitting that their special status creates discrimination against state citizens.

The second section of this brief discusses tribal sovereign immunity and how it was created by federal Indian common law. The final section of this brief expands on the previous amici brief of CERF and CNYFBA in support of the petition for certiorari in this case that explained that the Indian Reorganization Act (IRA), 25 U.S.C. §§ 415 et seq., made the tribal governments into Article I territorial governments as a matter of federal law. It concludes by explaining how this Court through federal Indian common law expanded the authority of these territorial tribal governments beyond what Congress itself could have legislated to the detriment of state citizens and state sovereignty.

Argument

What legal points to emphasize before this Court has been confused by the ploy made by the Oneida Indian Nation (OIN) on November 29, 2010 in adopting a tribal ordinance to partially waive their sovereign immunity for the payment of property taxes. The subsequent letters filed by OIN Counsel of Record to the Clerk of this Court go even further in describing the change of the legal position of the OIN. *Amici curiae* CERF and CNYFBA address this case in a manner that allows the Court to determine for itself whether the OIN may waive its "sovereign immunity" that was created as a matter of federal Indian common law. The Second Circuit concluded that since the land parcels owned in fee are still "Indian country," originally another creation of federal Indian common law, the Oneida tribe enjoys sovereign immunity from the counterclaims brought by Madison and Oneida Counties (Counties) for unpaid property taxes. The Second Circuit made this conclusion while agreeing that in *City of Sherrill* this Court held that a state reservation was created by the Treaty of Fort Schuyler in 1788 before the Constitution of the United States took effect. The Second Circuit also concluded that even though the former reservation had been under the continual jurisdiction of the state of New York it was still federal "Indian country." While the *Sherrill* ruling calls into question the equity of reestablishing long extinguished rights of tribal sovereignty, it did not expressly reach the issue of whether the former state reservation of land is or is not presently federal "Indian country." Applying the doctrine of laches 35 years after unleashing the special trust relationship of the United States for the OIN against all other citizens of New

York did not stop the state jurisdiction issues that are presented in this case and cannot by itself resolve the lower federal courts from continuing to apply federal Indian common law to keep the claims of the OIN viable.

I. THE SPECIAL FEDERAL STATUS OF INDIANS AND INDIAN TRIBES SHOULD BE TREATED AS DIVERSITY OF CITIZENSHIP TO STOP ACTUAL DISCRIMINATION AGAINST STATE CITIZENS AND THE COUNTIES

a. A Short History of Federal Territorial Policy

Today we forget that this nation started as 13 small colonies greatly outnumbered in population by the Native Americans. In the 1790's and beyond, no single State could defeat a confederation of Indian tribes. The early United States had its sights set upon controlling and expanding its land holdings no matter what the effect on Native Americans, just like the prior European sovereigns. The main policy and purpose of the United States toward Native Americans was the acquisition and domestication of territorial land. The Indian Commerce Clause, Art. I, Sec. 8, Cl. 3, and early federal Indian policy were all developed as a defensive position of avoiding military conflict in the territorial lands to allow continued settlement and expansion of civilization as the European descendants envisioned. Before the Revolution the French and Indian Wars convinced the colonists that it was critical to their success of maintaining and growing European settlement to be able to defend themselves against

Indian tribes. The British used the Indian tribes against the colonists during the Revolutionary War and continued to provoke conflicts until after the conclusion of the War of 1812. Nowhere was this more apparent than in the nascent New York State with the split of the Iroquois Confederacy and the ensuing wars with the Seneca and Cayuga that required the national army to suppress the uprising. *Amici* recognize that the historical OIN allied with the future United States and appreciate the contributions made by them during and after the American Revolution. But the fact they were allies did not change the overall defensive posture or harshness of the early federal policy toward native cultures embodied in the Constitution.

This harsh history was rewritten by Felix S. Cohen as part of the implementation of the Indian Reorganization Act of 1934 as the Federal Handbook of Indian Law.[2] This book like the War Powers compendium of Solicitor William Whiting is a written attempt to justify a federal policy. See W. Whiting, War Powers Under the Constitution of the United States, (War Powers), (43d ed. 1871). Like all pieces of propaganda produced by government for a purpose, it deliberately placed facts in the best light possible to meet its policy objectives. The fact that Felix Cohen was tasked with this project as a solicitor of the Indian Organization Division of the Bureau of Indian Affairs reflects how sweeping the IRA was intended by John Collier to be. Many specific facts of relevant statutes and actions of the United States were omitted in the

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[2] Cohen's philosophy of how to depict federal Indian Law is explained in "The Spanish Origin of Indian Rights in the Law of the United States," The Georgetown Law Journal, Vol. 31, P. 1, November 1942.

Cohen Handbook. This short history is intended to correct the historical record by including facts that were omitted from the previous cases with the OIN.

Under the compromise that became the Northwest Ordinance, laws regarding the territorial or public lands of the United States were quickly developed as the nation grew. Only lands ceded by States outside of their boundaries were deemed "federal territory" under the Property Clause, Art. IV, Sec. 3, Cl. 2. These federal territorial lands were subject to the Northwest Ordinance of 1787 originally under the Articles of Confederation, and then as adopted as the first law passed under the new Constitution. The development of federal territorial law required decisions on how to legally acquire lands from Indian tribes to allow those lands to become part of the public domain subject to disposal under the Homestead Acts and other federal cession laws as required by the Property Clause. Territorial land law by English definition encompassed the war powers necessary to civilize a wild land and domesticate the land and its people. More importantly, the distinction made by the English as to domestic versus territorial law had been a major cause of the Revolutionary War itself by denying to the colonists the constitutional rights of Englishmen. The Framers of our Constitution because of this distinction in fundamental rights between the application of domestic and territorial law specifically required that Congress "dispose of the territories." Property Clause, Art. IV, Sec. 3, Cl. 2. This requirement to dispose of the territory and create new States was defined by this Court as allowing the United States to retain territorial land only on a temporary basis. *See Pollard's Lessee v. Hagan*, 44 U.S. 212, 221 (1845). This specific requirement was meant to prevent

the United States from being able to use the territorial war powers as domestic law against the States and individuals. It is one of the most fundamental pieces of the structure of our Constitution.

Congressional decisions regarding disposal of tracts of land under the Homestead laws were often contentious, as immigrants poured in from Europe. The framework designed in the Northwest Ordinance to transition territories into new states of the union worked. But, there were several very difficult problems in territorial public land law that had to be legally defined in the young republic. It was understood that some of these definitions would affect the balance of power between the States and the United States. The first of these was regarding the doctrine of preemption of land in the original colonies. Preemption is necessary when a land sale or disposal is not completed and the land reverts to its territorial owner without having been transitioned into private property. Because many of the new States had not agreed as to their Western boundaries at the time of the adoption of the Constitution, including New York, there was an immediate issue of whether the United States or the Original States held the preemptive right. This question was resolved in favor of the States. *See Fletcher v. Peck*, 10 U.S. 87 (1810).

The next big question was the issue of which sovereign could extinguish "Indian title" or the occupancy interest of the Indian tribes that was acknowledged under English law. This was not considered a federalism question because the United States Congress as part of the compromise to enable the Louisiana Purchase had already passed a statute authorizing the President to negotiate the removal of any Indian tribe East of the Mississippi to the Western

territories and conceding that those Indians and Indian Tribes that remained in the Eastern States were under state jurisdiction. See Act of March 26, 1804, § 15, 2 Stat. 289. This act has never been repealed even though it has been omitted from prior statements of fact regarding the New York Indians.

The "Indian title" case of *Johnson v. McIntosh*, 21 U.S. 543 (1823) presented the problem of whether the United States was the successor to the sovereignty established by England over the Northwest Territory and former colonies. The British had negotiated many treaties with the Indian Tribes during and prior to the Revolution where all their land rights were ceded to Great Britain. The British King had made land grants based on these Indian treaties to British officers for their service in the American Revolution. If the United States was a successor to the British sovereignty then the British grants were valid. In a clever application of constitutional law, Chief Justice Marshall preserved the concept of "Indian title" but divested it from its origins in Europe by ruling that only the United States as the winner of the Revolutionary War had the authority to accept the Indian land cessions by treaty. Because the United States had already conceded that it did not control Indian land in the Eastern States in the 1804 Louisiana Purchase statute, the resolution of the Indian title question that removed the British cloud of title to millions of acres of Western lands only invigorated the outcry in the original States for the removal and actual cession of the Indian title in their respective States.

In the 1820's the President began to vigorously pursue a removal policy. The Congress passed the federal Removal Act of 1830, 4 Stat. 411, to define and enforce the removal policy agreed to in 1804. The Treaty of Buffalo Creek, 7 Stat. 550, was a Removal Act

treaty intended to disestablish whatever federal interests may have been created in New York by the Treaty of Canandaigua, 7 Stat. 4. Because many different bands of various tribes were involved in the Treaty of Buffalo Creek, amendments were made and Congress ratified the Treaty of Buffalo Creek in 1840. President Martin Van Buren then entered the Proclamation making the Treaty of Buffalo Creek complete. *See New York Indians* at 10, Fn.1, Finding 10. The Removal Act was specifically drafted to meet the obligations of the federal government to the states to remove the Indians, dispose of the "Indian title" to the lands they occupied and fulfill their federal treaty interests on actual federal territory West of the Mississippi as defined in the 1804 Louisiana Purchase statute so that state jurisdiction would no longer be impaired in the Eastern states.

Chief Justice Marshall apparently disagreed with the Removal Act policy defined by Congress. Chief Justice Marshall tried to interfere with the Removal Act with his rulings in *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1 (1831) and *Worcester v. Georgia*, 31 U.S. 515 (1832). Congress responded to the Chief Justice by passing the 1834 Indian Trade and Intercourse Act, 4 Stat. 729, deliberately ceding that all Indian tribes and Indian land East of the Mississippi River would no longer be under federal protection once their lands were exchanged pursuant to the Removal Act, overruling *Worcester* by statute. The Cherokees in Georgia were removed by the federal military to their new lands in Oklahoma. The New York Indians, including the Oneida, pursuant to the Removal Act, the Treaty of Buffalo Creek and the specific treaties negotiated with each tribe pursuant to the Buffalo Creek Treaty, mostly left New York settling partly in

Kansas but mostly in Wisconsin. As a matter of federal statutory law, the Indians that remained were solely subject to state jurisdiction.

By the 1840's federal territorial law was very developed and functioning fairly smoothly. *United States v. Gratiot*, et al, 39 U.S. 526 (1840). Congress debated when to open additional public lands to settlement and began making land grants to railroad companies as compensation for fronting the capital to extend rail service. The basic process of converting territorial land by extinguishing the "Indian title" into public domain land subject to disposal was settled law. The statutory process of setting up new territories with some powers of self-governance in an organic act was also well established. That is federal territorial law was functioning as intended by the Framers of the Constitution until 1850 when it came to the question of slavery and the adoption of an organic act for Kansas and Nebraska and the newly acquired territorial land from Mexico.

Allowing persons to be characterized as "property" was more than a simple legal question of status. Slavery was a fundamental contradiction to the way English common law had developed over centuries to protect and expand the rights of freemen. England had dealt with the slavery question before the American Revolution by prohibiting slavery on the soil of England. This allowed slavery in all of the British territories under English territorial law, including the future United States. The fundamental contradiction of slavery was incorporated into our Constitution. The slavery problem culminated in the *Dred Scott v. Sandford*, 60 U.S. 393 decision in 1857 and our Civil War. The *Dred Scott* decision permanently altered our territorial public land law by creating an absolute

power in the United States to preserve territorial status indefinitely. It did this by declaring the Northwest Ordinance of 1787 unconstitutional and the Property Clause a nullity. *Scott* at 435-6. The territorial war power of the United States to refute or declare fee land territory was deemed a "political question" during Reconstruction. Not until *Rasul v. Bush*, 542 U.S. 466, 480-4 (2004) when this Court did not accept the declaration of the military that the Guantanamo Bay Naval Station was not territory under the control of the United States was judicial review reinstated over the status of territorial land.

After the Civil War and the assassination of President Lincoln, the Secretary of War Edwin Stanton figured out that he could make many of the territorial war powers permanent domestic law to prevent the States from ever being able to cause another civil war. He wanted to use the former slaves as wards of the national government. See War Powers, citing No. 9 Extract from the Records of the War Department regarding the proposed Emancipation Bureau, p. 464-6, (43d ed. 1871). But, the passage of the 13th Amendment conferring actual citizenship on the freedmen ended their ward status. But he could and did use the Indian wards to preserve the territorial war powers at the expense of state sovereignty. Even though he died before it was completed, his plan became the new Indian code of the Revised Statutes passed in 1871 that formally ended the treaty making power. The war powers of Reconstruction were used to form the new Indian policy of 1871 and immediately applied to the Indian tribes that had fought for the Confederacy. From 1871 forward tribes by statute are not "domestic dependent nations" but instead are wards and actual federal instrumentalities of the United States. *See*

Holden v. Joy, 84 U.S. 211 (1872). As long as there are federally recognized Indian tribes on federal territorial land, this Reconstruction policy that deliberately contradicts the carefully constructed constitutional structure requiring disposal of all territorial land to prevent territorial war powers from being used as domestic law will continue to be part of federal power.

Commissioner John Collier was aware of the policy of 1871 and the fact that the Indians were not just wards but were actual federal instrumentalities of the United States. Then the limited version of the Indian Reorganization Act (IRA) passed in June 1934 and the already formed Indian Organization Division (IOD) of the Bureau of Indian Affairs (BIA) went to work to apply the IRA the way Collier had envisioned it. This was the only way that Indian tribes on fully allotted reservations or on former state reservations that still existed in some form could be brought under the IRA and allowed to form their own tribal territorial governments.

Collier's plan was not intended to be the permanent change of law that Edwin Stanton had envisioned. John Collier was a true Indian activist that believed that by giving the Indian tribal governments true territorial status that he was making them equal enough to the States to actually earn respect and a place in greater society. This was the idea behind the doctrine of separate but equal of *Plessy v. Ferguson*, 163 U. S. 537 (1897) that was the civil rights standard in 1934. As came to light in the briefing of *Carcieri v. Salazar*, the IRA as passed by Congress was not the very expansive original version of the IRA submitted by John Collier. This led to serious interpretation problems by the Bureau of Indian Affairs and the solicitors for the Department of the Interior that had

begun applying the full version of Collier's IRA six months before Congress passed the very limited act that is today the IRA. The Bureau of Indian Affairs had created a special division of Indian Organization on January 1, 1934 in anticipation of the passage of the sweeping IRA proposal. The Indian Organization Division (IOD) was the sponsor of the ten special Indian congresses that were held all over the country to promote the passage of Commissioner John Collier's IRA. This division led personally by Commissioner Collier made many promises at the conferences and in correspondence to specific tribes over how the IRA would help them to gain their support for its passage in Congress. Many promises were made by the IOD while legislation was pending that the IRA would apply to the tribes that no longer had a land base or tribal organization, including the California Indians. Congress in particular reacted negatively against the idea of "restoring" tribal identities in California that had been wiped out by the Spanish and Mexican Mission system.

Even though Congress limited the IRA as Collier had initially designed, the territorial war power was already established and was available for use by the IOD. By indefinitely extending the trust period for holding Indian lands in the IRA, and allowing the Indian tribes actual territorial governments the Reconstruction policy of Secretary Stanton was made even more powerful. These territorial war powers are the "emergency" powers in a common law legal system. This extra-constitutional power has become so accepted today that most major federal legislation is passed by claiming an "emergency" or "declaring a war" on some problem. This Court cannot make substantial changes to federal Indian policy without affecting this claimed territorial war power of the federal government. It is

also the reason that Congress and the Executive will never willingly change federal Indian policy. The IRA really was the Indian "New Deal." The IRA reinforced President Franklin D. Roosevelt's numerous "emergency" programs by bringing the Reconstruction Policy of Secretary Stanton into the Twentieth Century for the "benefit" of the Indians. With President Nixon's Message to Congress of July 8, 1970, his administration used these powers without any restraints.

b. Indians and Indian Tribes Have Special Status That Causes Discrimination Against Non-Indian Defendants and States

How the Indians and Indian tribes have been classified in law has resulted in discrimination against non-Indians and threatens state sovereignty. The land claim litigation in New York aptly demonstrated the threat against settled expectations of property rights, municipal self-governance, rights of free speech and even the right to vote for government representatives. The potential disruption of these justifiable expectations in the general populace of Madison and Oneida Counties made the federal courts aware of the tremendous effect that Tribal litigation can bring. This ability to disrupt thousands of individual property owners and state governance flows directly from the special federal status the Indians and Indian tribes have with the federal government.

Amici will not belabor this point. The Indians and Indian tribes are "wards" of the United States that enjoy an historic "special trust relationship." In addition, many Indian tribes including the OIN have federal treaty rights that give them enumerated special

rights like hunting and fishing or in the case of the Oneida's free passage on all waterways. These treaty rights have been deemed to be supreme federal law and are enforced before all other rights or interests. Indians and Indian tribes are also "federal instrumentalities" as designated by statute placing their real and personal property, rights to contract, make leases and even their right to make wills and other testamentary instruments under the direct control of the federal government. The federal government can order an Indian or Indian tribe to move their residence or completely dispossess them without having to pay compensation. In addition, Indians were made naturalized citizens of the United States in 1924. Indian rights to state citizenship were heavily enforced beginning in the late 1960's conferring upon reservation Indians the right to vote in state elections even though they were completely exempted from paying state income or property taxes.

It is the fact that Indian tribes are considered separate sovereigns and have their own territorial governments since 1934 that has caused most of the discriminatory affect. Indian tribes continuously push to expand or defend their "sovereignty." Tribal courts are always trying to assert jurisdiction over non-Indians and to expand their jurisdiction to adjudicate all kinds of claims that affect off reservation persons and property. This Court has done well in the last 20 years in protecting non-Indians from direct discrimination caused by having to litigate in tribal court. However, requiring the exhaustion of tribal court remedies before being allowed to sue a tribal member demonstrates the bias in favor of the Indians that has become a part of federal Indian common law. Federal courts have declared that in all treaties, contracts and laws any "doubtful expressions" are to be interpreted

as an "Indian" would have understood. *Squire v. Capoeman*, 351 U.S. 1 (1956)

And then there is tribal sovereign immunity that allows the tribes to sue without being subject to suit. Because this case is about an application of tribal sovereign immunity, a full discussion of its creation as a matter of federal Indian common law is the next section of this brief. To sum up this section, Indians and Indian tribes recognized by the United States are different because of their special federal status from ordinary non-Indian state citizens. This special status disadvantages state citizens and state government far more than did the diversity law, that was overruled by *Erie Railroad v. Tompkins*.

The attempt by Madison and Oneida Counties to enforce tax liens in state court against the OIN that is the subject of this case is the perfect example of the discriminatory affects noted in Erie. In each case, not only did the OIN assert its sovereign immunity from suit it actually asserted sovereignty over the land itself that required litigation all the way to this Court. Even after this Court ruled that the OIN could not rekindle its sovereignty over the parcels of land subject to foreclosure two different federal court judges granted injunctions against the County proceedings in state court claiming federal question jurisdiction based on claimed tribal sovereignty under federal Indian common law over the land. The Second Circuit upheld the federal injunctions against the state court proceedings based on tribal sovereign immunity as a matter of federal Indian common law. Because all documents and actions are to be interpreted in favor of the Indian tribe, even if this Court strikes down tribal sovereign immunity as a defense, the federal courts in New York will just find another federal Indian common

law excuse to prevent the Counties from enforcing the taxes against the property of the OIN.

The OIN knew this when it passed its Ordinance of November 29, 2010 executing a partial waiver of sovereign immunity. The OIN rightfully has confidence in how it can continue to evade the payment of taxes and avoid actual foreclosure because the Counties are bound to pursue their claims in state court. The only way these property taxes will ever be enforced is if the OIN has no federal Indian common law claim to make in federal court to get an injunction to stop the state court proceedings.

c. The Erie Doctrine Should Be Applied to Indians and Indian Tribes

The case of *Erie Railroad v. Tompkins*, (1938) reinterprets § 34 of the Federal Judiciary Act of September 24, 1789, c.20, 28 U. S. C. § 725, which provides:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Erie at 71. The premise of this provision was to insure that the local law as developed by the state courts would be the common law used in both state and federal courts. New York State has an entire statutory code section on Indians dating back to the 1780's and developed its own common law in regards to their treatment. In fact, New York common law went well

beyond federal law from an early date to protect actual tribal interests and tribal processes of decision making over tribal members. This is why the New York Indian tribes can rightfully claim that the Haudosaunee Council still exists to govern the six tribes of the Iroquois Confederacy. This deference to tribal cultures continued even after most of the Indians left New York for Wisconsin. The State of New York treated the Indians as a matter of statutory and common law far better than did the United States who treated them as potential combatants and as wards that they controlled completely. By contrast, the Indians that remained in New York were state citizens allowed to live under their local laws as a matter of New York common law and statute dating back to the 1830's. Only if major criminal activity occurred did New York enforce its own law against the Indians. The New York Indians including the OIN were under the primary jurisdiction of New York by federal statute and by the rulings of this Court until the passage of the IRA in 1934. *See United States ex rel Kennedy v. Tyler,* 269 U.S. 13 (1925).

With the passage of the IRA, the federal government through the IOD immediately tried to organize the still existing tribal governments of New York under the IRA. Every tribe in New York voted against organizing under the IRA in 1935. The fact they were allowed to vote at all on the IRA demonstrates the fact that the IRA was capable and even intended by Collier to alter the settled law regarding Indians that had been under primary state jurisdiction since before the Constitution was adopted. As was discussed in the briefing in the case of *Carcieri v. Salazar,* Congress threatened to repeal the IRA over how Commissioner John Collier and the IOD were applying the IRA to

exceed the limited law that Congress actually passed. As decided by this Court, the Secretary of Interior's interpretation of Section 479 allowing all Indian tribes to have the benefits of the IRA was incorrect. Congress limited the IRA. It was this Court in applying the new policy of the IRA as a matter of federal Indian common law that allowed the full brunt of its territorial war powers to displace state law.

The expansion of federal Indian common law to enforce the new policy of the IRA started with *United States v. Minnesota*, 305 U.S. 382 (1938). The legislation of the IRA as passed did not repeal any of the prior allotment acts of Congress. It is through the federal Indian common law decision in *Minnesota* that the IOD could extend the IRA over all former allotted lands. The next case was *United States v. McGowan*, 305 U.S. 535 (1938). In *McGowan*, the BIA was allowed to characterize fee lands purchased for the Indian colony in Nevada to be defined as "Indian land." By equating all types of "Indian land" as a matter of federal common law, the IRA is not confined to federal "reservations" as defined in Section 479. The IOD then used the Indian trust to invoke the paramount sovereign authority of the United States in *United States as Guardian of the Walapai v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941). This decision arguably makes all former "Indian land" federal "Indian country" again as a matter of federal Indian common law. These cases along with *U.S. Fidelity* to extend federal sovereign immunity over tribal interests to create "tribal sovereign immunity" as federal Indian common law discussed at length below were designed to get around the restrictions placed into 25 U.S.C. § 479 of the IRA. As stated by the Erie Court: "The federal courts assumed, in the broad field of 'general law,' the power to declare

rules of decision which Congress was confessedly without power to enact as statutes." *Erie* at 72. This Court in placing the federal Indian trust lands within the overriding context of the equal application of the law in *Hynes v. Grimes Packing*, 337 U.S. 86, 123 (1949) came close to adopting the Erie Doctrine to end federal Indian common law.

The cases cited above expanding federal Indian common law pale in comparison to the decisions made by this Court following the Nixon Message to Congress in 1970. The most egregious federal Indian common law decision that directly created this present controversy was the acceptance of federal jurisdiction as a matter of equity in *Oneida I*. This Court in *Oneida I* rewrote the doctrine of preemption, omitting three federal statutes and two federal treaties to find that Indian title still resided in the United States over the former Oneida state reservation. More than 30 years later, this Court in *City of Sherrill* applied the doctrine of laches to end the disruption of justifiable expectations it had allowed against the state and citizens of New York. As this case proves, the *City of Sherrill* ruling was not enough to end the litigation or resolve the questions of state versus federal jurisdiction that are now so confused by federal Indian common law rulings of the federal district courts and appellate courts that resolution will be very difficult.

As Justice Brandeis wrote in Erie:

> "Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift* v. *Tyson* introduced grave discrimination 'by non-citizens against citizens. It made rights enjoyed under the

> unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State. The discrimination resulting became in practice far reaching. This resulted in part from the, broad province accorded to the so-called "general law" as to which federal courts exercised an independent judgment." In addition to questions of purely commercial law, "general law" was held to include the obligations under contracts entered into and to be performed within the State..."

Erie at 74. The manipulations of the OIN with their special federal status as discussed above has caused far more discrimination in the state and federal courts and more manipulations than anything diversity jurisdiction allowed under *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842). The recent adoption of the OIN tribal Ordinance of November 29, 2010 more than proves this point. Also, there are so many federal Indian common law decisions affecting this case that correcting them all will take many more years of litigation. The people and State of New York must be given the equal protection of federal law. This Court can stop the discrimination by extending the Erie Doctrine to federal Indian common law by holding that the special federal status of Indians and Indian tribes is akin to the discrimination

previously created by diversity under *Swift v. Tyson*. Self-imposing a limitation on this Court's equity jurisdiction prevents this Court from making "law" that Congress itself has no power to make. If Congress chooses to extend tribal sovereignty in legislation then this Court is in its proper role of reviewing the statute and determining whether it is constitutional.

II. TRIBAL SOVEREIGN IMMUNITY

This Court has already determined that the legal basis of tribal sovereign immunity makes the whole doctrine suspect. *See Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751 (1998). The Court mistakenly allowed tribal sovereign immunity to continue because it assumed that Congress would act and define limits for the doctrine. Tribal sovereign immunity is a federal common law creation. If it is going to be limited, it is up to this Court to do it.

a. Origin of Tribal Sovereign Immunity

Tribal sovereign immunity did not even exist until 1940 and the decision in *United States v. United States Fidelity and Guarantee Co. et al.*, 309 U.S. 506 (1940). This decision cites *United States v. Minnesota*, 305 U.S. 382 (1939) that extended federal sovereign immunity to the Indian Nations under the tutelage of the United States. *U.S. Fidelity* at 513, Fn 14. The Minnesota Court found that Section 2 of the IRA, 25 U.S.C. § 462, extending indefinitely the trust period for allotted lands had negated previous acts of Congress that gave the states specific rights to sue and condemn Indian allotments in state court without naming the United States as an indispensable party. *Minnesota* at

387. In *Minnesota v. United States*, the sovereign immunity of the United States was expanded to include all "Indian land" per a regulation promulgated in 1938. *Minnesota* at 390, Fn 7. One year later, this Court extended federal sovereign immunity to cover tribal interests because of public policy. *U.S. Fidelity* at 512-4. This new public policy was created by the adoption of the Indian Reorganization Act (IRA) of 1934 as discussed in *Minnesota v. United States*.

While the *Minnesota* and *U.S. Fidelity* cases expanded federal sovereign immunity and effectively made the federal courts the exclusive courts to hear claims to condemn Indian lands for public purposes, these cases do not actually decide that the sovereign immunity belongs to the Indian tribe. In fact, this Court in *U.S. Fidelity* concludes "It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did." *U.S. Fidelity* at 512.

It is not until *Puyallup Tribe v. Department of Game of Washington*, 433 U.S. 165 (1977) and *Santa Clara Pueblo v. Martinez*, 436 U.S. 39 (1978) that this Court reinterprets *U.S. Fidelity* to find independent tribal sovereign immunity as a matter of federal Indian common law. The Justice Department acting in an amicus capacity stated that the Solicitor General has no authority to waive the sovereignty of the tribe. Therefore, this Court was left to decide either the tribe had no sovereign immunity or the tribe's sovereign immunity is separate from the sovereign immunity of the United States. *See Puyallup* at 170-1. A similar ploy was used in *Santa Clara* by the Justice Department where they cut and pasted clauses from separate sentences in *U.S. Fidelity* to have this Court conclude "But 'without congressional authorization,' the

'Indian Nations are exempt from suit.' *Id.* at 512." *Santa Clara* at 58.

As this Court correctly concluded in *U.S. Fidelity* and *Minnesota*, since the IRA was passed in 1934 all Indian land over which a tribe can exercise inherent sovereignty is held in trust for Indian tribes by the United States. Therefore, it is the sovereign immunity of the United States as the trustee to the Indians and as owner of the Indian land that is controlling. To hold otherwise allows the United States to be completely unaccountable when it supports the Indian tribes and individual Indians as federal instrumentalities to challenge state jurisdiction. This Court realized that it had been misled about the expansion of tribal sovereignty being "harmless" when it smacked into the loss of individual rights and state jurisdiction that would have occurred if the United States had been able to "sell" tribal criminal jurisdiction over non-Indians in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 201 (1978). Unfortunately, the realization that tribal sovereignty had to be restricted in keeping with their status as dependent sovereigns did not translate into the realization that tribal sovereignty was threatening the constitutional structure of federalism for another twenty years. This Court should consider limiting or revoking tribal sovereign immunity. Such action would not hinder Congress from passing legislation granting tribal sovereign immunity that will then be reviewable by this Court.

b. This Court Needs to Reconsider *Oklahoma Tax Commission v. Potawatomi Tribe*

This Courts ruling in *Oklahoma Tax Commission v. Potawatomi Tribe*, 498 U.S. 505 (1991) raises the very possibility that all lands placed into trust by the United States can restore territorial tribal sovereignty by holding that all such lands are subject to "absolute tribal sovereign immunity." *Id.* at 511. Most importantly, the "unification theory" that inherent sovereignty through Indian title can somehow be rejoined to lands purchased in fee must be completely laid to rest. Nothing threatens state sovereignty more than a federal Indian common law theory that territorial Indian sovereignty can be restored to Indian tribes that have lands placed into trust status or reacquire fee ownership over lands within a former reservation.

The question presented in *Potawatomi* was artfully constructed to misconstrue the federalism conflict. "The issue presented in this case is whether a State that has not asserted jurisdiction over Indian lands under Public Law 280 may validly tax sales of goods to tribesmen and nonmembers occurring on land held in trust for a federally recognized Indian tribe." *Id.* at 507. This characterization of the issue makes it appear that the state refused to exercise jurisdiction over Indian land except to assess taxes on it. The parcel of land on which the convenience store that sold the cigarettes was situated was held in trust by the United States pursuant to the IRA. *Id.* at 507. In fact, the parcel where the convenience store was located was off reservation fee land that had probably been taken into trust pursuant to the IRA, 25 U.S.C. § 465. *Id.* at 511.

The Oklahoma Tax Commission argued that these newly acquired off reservation lands should be treated as continuing under state jurisdiction. This Court summarily rejected the idea: "Here, by contrast, the property in question is held by the Federal Government in trust for the benefit of the Potawatomis. As in *John*,[*United States v. John*, 437 U.S. 634 (1978)] we find that this trust land is 'validly set apart' and thus qualifies as a reservation for tribal immunity purposes. 437 U. S., at 649." *Id.* at 507. This Court in *Potawatomi* made law that Congress itself is without power to make.

III. THERE IS NO "INDIAN COUNTRY" IN MADISON OR ONEIDA COUNTIES

a. Under the Facts determined in City of Sherrill these Parcels are Not Federal Indian Country

The Second Circuit concluded that this Court had explicitly not decided whether the Oneida reservation was disestablished in the *City of Sherrill* decision. It therefore reasoned that its prior holding determining that the parcels were "Indian country" was not overruled by this Court. Appendix A, 16a-17a, footnote 6. If the Second Circuit had concluded that the land parcels were not "Indian country" the OIN could not claim sovereign immunity to avoid the property taxes. The finding that the fee parcels subject to county taxation are "Indian country" shifts the jurisdiction over the parcels from the state to the federal court. Even though the term "Indian country" has been codified in 18 U.S.C. §§ 1151, the extension of this criminal statute into civil law is a matter of federal

Indian common law. By denominating the parcels "Indian country" the *in rem* jurisdiction of the Counties over the parcels of land was removed.

The federal common law application of "Indian country" was defined in the unanimous opinion of *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998). According to the opinion, the federal courts are empowered to designate three types of land to be Indian country (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments. In addition, for an area to be Indian country, there must be (1) a federal set aside for tribal use, and (2) federal superintendence. *Id.* at 526-7.

Using the facts determined in the *City of Sherrill* ruling, *amici* can prove that the parcels subject to taxation cannot be federal "Indian country." Justice Ginsburg addressed the factual background from the standpoint that the land in question had been under state jurisdiction since 1805. *Sherrill* at 202. Determining that an area is federal Indian country is a determination that the land is under federal jurisdiction, not that the Indians or Indian tribe are under federal jurisdiction. Justice Ginsburg specifically concluded that the Oneida tribe ceded all of its lands to New York in the 1788 Treaty of Fort Schuyler and then the state reserved for the use of the Oneidas the land they mutually agreed the Oneidas would retain for their occupancy. *Sherrill* at 205. The Supreme Court further clarified this position in Footnote 1, directly citing the Second Circuit's 1988 decision that the

Oneida reservation was a reservation of state land. *Sherrill* at 203-4. Applying the definition of Indian country in *Village of Venetie*, these lands were never allotted and have never been under federal jurisdiction. This leaves only the possibility that somehow the Oneida Indians who reside all over the area are somehow a "dependent Indian community." To be a "dependent Indian community" they must be uncivilized Indians living apart from general society on territorial lands. *See United States v. Sandoval*, 231 U.S. 28, 39 (1913). The Oneida Indians were fully integrated into the citizenry of New York from the time of the signing of the Treaty of Fort Schuyler in 1788. *See United States v. Boylan*, 256 F. 468, 477-8 (N.D.N.Y. 1919). In addition, the land was set aside by the State of New York and has never been under federal superintendence. The Second Circuit was clearly wrong in determining that the state reservation for the Oneida could ever be federal "Indian country."

b. The City of Sherrill Ruling on Laches

The conclusion by the Second Circuit that the former reservation land was federal "Indian country" was reversed by the application of the doctrine of laches in *City of Sherrill*. By definition, laches stands for the proposition that as a matter of equity the matter cannot be brought up because too much time has passed. The Supreme Court expressly held that it would upset "justifiable expectations" to allow the claim. *Sherrill* at 215-7. Under the Federal Rules of Civil Procedure a dismissal under the doctrine of laches is a dismissal pursuant to Rule 12(b)(6) for failure to state a claim. If on a motion made under Rule12(b)(6) matters outside the pleadings are presented then the

motion is treated as a motion for summary judgment. Fed. R. Civ. Pro. 12. *See also Lennon v. Seaman*, 63 F.Supp.2d 428, 438-9 (S.D.N.Y. 1999). The Supreme Court reversed the judgment of the Second Circuit in *City of Sherrill* by applying laches as a matter of equity. The application of laches to the case precluded the federal courts from ever hearing the Oneida's claim that the land was not under the sovereign jurisdiction of New York, effectively nullifying all the factual findings and legal conclusions of the Second Circuit and the federal district court. The fact that the Second Circuit is still concluding that these parcels of land are federal Indian country demonstrates how absurd the application of federal Indian common law has become.

Conclusion

The Court should reverse the decision of the Second Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 10-72

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IN THE

Supreme Court of the United States

MADISON COUNTY AND
ONEIDA COUNTY, NEW YORK, PETITIONERS

v.

ONEIDA INDIAN NATION OF NEW YORK AND
STOCKBRIDGE-MUNSEE COMMUNITY,
BAND OF MOHICAN INDIANS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLACEMENT BRIEF FOR ONEIDA LANDOWNERS, INC., AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The Amicus Madison-Oneida Landowners, Inc. is an association of private landowners and tax payers owning homes and businesses in Madison County, Oneida County of Central New York State. They are neighbors of the Respondent.

The association was formed to oppose the Respondents federal suit to evict the members from their modern fully developed properties held for over 200 years under fee simple warranty deeds originating from the State of New York. It was further formed to obtain equality at law with the Respondent who, claims tribal and sovereignty exemption from law, denies a duty to pay for governmental services furnished by the members through taxation to the Respondent which, services are used to gross millions of dollars a year in business revenues without payment for the services used.

SUMMARY OF ARGUMENT

The doctrine of Indian immunity from suit originated as a protective device for Indian tribes whose activities were as internal hunter gatherer.

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[1] Pursuant to Rule 37.6, *Amicus Curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *Amicus Curiae* has made a monetary contribution to the preparation or submission of this brief. Counsel for the parties have consented to the filing of this brief.

That is not true today. Today it is reported that the Respondent lead by a law school graduate turned Indian businessman grosses over $300,000,000 annually in revenues from its ownership and operation of a large casino, hotel, sports complex, cigarette manufacture, t-shirt manufacture, shopping center, twenty+ gas stations on widely scattered locations next to the non Indian premises but outside of the control of local government. That destroys unity of governmental control over the area, impairs or destroys the property values of members, threatens the existence of Town and County government as the Respondent continues to extend its business purchases on the cover provided by this doctrine and sovereignty.

The members are adversely affected as taxpayers and citizens with higher property taxes on their properties to pay for the profitable Indian business.

This Court in the past has deferred to Congress for action on sovereign immunity. Congress has not considered this issue. It has left it up to this Court to reach and determine the necessity and reach of its own doctrines.

The limited waiver of immunity by the Respondent is ineffective to moot this issue in general or in specific, but it clearly shows the Respondent is not in need of these doctrines to obtain the financial ability to pay its share of the taxes without prejudice to its operations.

The doctrine of Indian immunity should be revised, eliminated, or revised to allow sovereign rights

of the State of New York, and its counties and towns to be asserted by suit if so advised and to allow suit by taxpayers and citizens where their property and governmental rights are adversely affected.

The Oneida Reservation has been completely disestablished by 1) the Supreme Court rulings under the Sherrill decision, 2) Federal pre approval of the transactions in the Treaty of Canandaigua by a grant of right to purchase to the individual US citizens and 3) by equity because this is an ancient dispute that is impractical, impossible inequitable to resolve other than leaving the parties as they were before the purchases.

The City of Sherrill is self explanatory, covered in the brief of the Appellant and complete disestablishes any right in the reservation.

The Treaty of Canandaigua contains a clause interpreted by the United States Senate as granting a right to any American to purchase the lands of the Oneidas without federal approval under the non intercourse act (Appendix aa15 to aa17, The Congressional Globe 26 Congress 1st Session Treaty with the New York Indians page 290, Paragraph 2 of the Treaty of Canandaigua) . This interpretation of the Treaty was reaffirmed by the US Attorney General in the Indian Land Claim Court of Claims. This interpretation by the Senate allowed the Oneidas to sell directly to whomever they wished subject to New York's right of pre-emption. This was the policy of the United States Senate for the sale of Land by the New York Indians as stated by the Chairman of the Senate Committee on Indians.

During that 200 years the area lost all Indian character. It would be impossible and impractical and a violation of State sovereignty to grant Indians rights in an area that has lost all indian character. Over 100,000 non Indians live on several hundred thousand acres that now have farms, roads, thruways, canals, trains, highways, towns, cities, villages, counties and 200 years of uninterrupted New York political rule. The land in question has been sold repeated for money in reliance on the validity of the title and the owners are good faith purchasers for value.

The land owners should not be made victims of fickle, vacillating federal policy from 200 years ago. They have been threatened with ejectment. They have had to pay the taxes the Oneida Nation refuses to pay to maintain services to that the Oneida Nation uses. They were the ones who were put out of business when the Oneida Nation targeted a business and undercut the non indian businesses by refusing to collect the taxes.

Absent a governing statute by congress or consent by congress or the State of New York or the cities to the transactions, the court should use the most basic principals of sovereignty: the sovereign has absolute control over his territory, who does business in it and the terms they do business on.

The Oneida Nation was not a federally recognized tribe as of 1934. Sovereignty ends at the reservation line and Kiowa does not mandate sovereign immunity in this case.

The unilateral off reservation purchases by the Oneida Nation are void.

ARGUMENT

I. TRIBAL SOVEREIGNTY SHOULD BE RECOGNIZED AS A ANACHRONISM

Twelve years ago this Court declined to rule on the Court originating Indian claims of sovereignty and immunity from suit, passing off to Congress those questions (*Kiowa Tribe of Oklahoma v. Manufacturing technologies Inc.*(532 U. S. 751 (1998).

In the intervening 12 years Congress has not even considered the problem leaving this Court the only avenue open to do fairness and justice.

In the intervening twelve years the problem has grown to large proportions and presents a danger to the functioning existence and functions of Town and County government necessary to the property values of the members.

The Respondent now reported to have grossed over $300,000,000 annually in revenues from the ownership and operation of a large casino, hotel, sports complex, cigarette manufacture, t-shirt manufacture, ownership of a shopping center, twenty + gas stations in widely scattered locations next to the members premises but outside of the control of government.

That destroys the unity of control over the area and the property values of members and threatens the existence of Town and County government as it

extends by purchase. It is lead by a law school graduate who conceived and executed this business plan using the Court immunities presented.

Now the Court has decided that at least the government has rights to collection of its revenues by foreclosure (*Sherrill v. Oneida Nation* 544 U.S. 197).

Now the Respondent claims immunity from suit and waiver of immunity at the same time. That waiver indicates the clear lack of need to continue the Court doctrine of immunity from suit since surely if the Respondent has sufficient funds, pay taxes and survive it does not need immunity from suit for those taxes. However, waivers are just that i.e. waivers. No governmental body can bind a later body. Further, there is no recitation or proof of passage by a competent legal body or what that body consists of. Thus, the doctrine remains for another day and another use having served its function of sliding by the issue.

The members are citizens of a government based upon the concepts of equality and due process and government. The time has come to recognize the threat to and the invasion of those rights, including the impairment in function and future existence of Towns and Counties of local government from Indian encroachment adjacent to their residences and businesses. The Respondent should not be allowed to do by purchase what this Court has forbidden it do by eviction.

It is apparent that Indian sovereignty and immunity from suit which originated for a internalized

hunter gatherer society no longer fits the changed times.

The abolishment of this historical anachronism of immunity from suit and sovereignty over purchased lands outside of the reservations for 200 years does no harm to the Respondent and is needed in fairness and to protect the rights of the other citizens.

II. ANY POSSIBLE RESERVATION OR INDIAN COUNTRY IS DISESTABLISHED.

On the Second issue specified by the Court i.e., the disestablishment and two hundred years later reestablishment of the reservation claim of the Respondent, it is the Amicus position that the Treaty of Canandaigua providing for sale of the reservation area in the choose to "sell clause" Article 2 (Appendix aa1) approved by Congress before the 1790 Trade & Intercourse Act of July 22, 1790 Ch. 33, 1 Stat 137, granted clear federally approved right of sale of the Respondents former reservation lands.

The Treaty of Canandaigua granted the Oneidas the right to sell land to individual people of the United States. The relevant clause is in Article 2 last sentence (Appendix aa1) The right to sell aspect of that clause has not been ruled upon by this Court.

> Article 2 the United States acknowledge the lands reserved to the Oneidas, Onondaga and Cayuga nations in their respective treaties with the State of New York and called their reservations to be their property: and the

> United States will never claim the same nor disturb them or either of the Six Nations nor their Indian friends residing thereon and united with them in the free use and enjoyment thereof: but the said reservation shall remain theirs until they choose to sell the same to the people of the United States who have the right to purchase.

The Presidential signed the Treaty of Canandaigua after approval by the Senate on 1/21/1795.

By this clause sales were made of the reservation without the need for Federal approval because of Congress specific approval of that right in the treaty approved after the non intercourse act.

This historically accepted interpretation of this clause was stated by Senator Ambrose Hudley Sevier, Chairman of the Committee on Indian Affairs in the Senate at the time of ratification of the Treaty of Buffalo Creek in March of 1840 at page 290 of the Appendix to the Congressional Globe 26 Congress 1st Session Treaty with the New York Indians (Appendix aa15). Mr. Sevier stated on the floor of the Senate when reciting the history of the New York Indians and the United States government when seeking approval of the Treaty of Buffalo Creek:

> The third and last Treaty [Treaty of Canandaigua] ever made by us with the Six Nations of New York in their confederate character (unless the one we are now considering should constitute a single exception) was made in 1794. This was an important treaty and has governed us in all out intercourse with them

> ever since. In that Treaty, we acknowledged separately to each of the tribes composing the Six Nations their individual right and title to certain specific reservations of land and we guaranteed to them separately the possession and enjoyment of the their respective reservations and conferred upon them the right to dispose of the reservations respectively in whole or in part to any citizen or citizens of the United States Whenever and however they might choose and for these rights the indians on their part engaged in the same treaty never to set up any claim to any other lands in the boundaries of the United States than those granted in that treaty.
>
> ***
>
> Having then as we have seen by the treaty of 1794 such amply power to dispose of these lands a power so often and satisfactorily exercised by them and the United States having no interest whatever in these lands and being constitutionally incapable of having any any and not being bound by compact as in the case of Georgia to extinguish indian title to those lands, it may well be asked why have we interfered in this affair?

(Appendix aa15)

This interpretation of these clauses persists to this day in the federal government. Regarding these clauses in the Treaty of Canandaigua The United States argued in the Indian Court of Claims on the

Treaty of Canandaigua cases as follows (Appendix aa4) (*Oneida Nation v. United States of America* Docket No.: 301, *Six Nations vs. United States* Docket No. 344):

> In the first place it recognizes the right of the state and Phelps and Gorham to purchase Indian title by describing the lands currently belonging to them by reference to the transactions which had occurred previously between the Indians and the States of Massachusetts and new York and the Phelps an Gorham. And the very language used to spell out the undertaking by the United States is an explicit acknowledgment of that right. The treaty says "the United States will never claim the same nor disturb *** [the indians] *** in the free use and enjoyment thereof: but shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase." No other Indian Treaty has been found which contains any such provision recognizing the right of the Indians to sell their lands to anyone other than the United States. This provision was an acknowledgment to them then well known fact that either New York or those who had purchased the pre emption right from Massachusetts had the right to purchase the Indian lands. Moreover, it was an acknowledgment that the Indians were free to sell their lands if they chose and that the United States was placing no restrictions upon such sales to those "who have the right to purchase." Furthermore it is a recognition of the fact that the laws of New York (Ex 1 31), the treaties

> between New York and the Indians (Ex 21) and the Hartford compact (Ex 26, p. 466) all placed restrictions on the purchase of indian lands and that only certain persons had the "right to purchase."

This was mentioned by the Court in *Seneca Nation v. Christy*, 162 U.S. 286: 16 S. Ct. 828 (1896) while reviewing *Seneca Nation v. Christie*, 126 N.Y. 122: 27 N.E. 275 (1891):

> By a treaty between the Six Nations of Indians, which included the Senecas, and the United States, dated November 11, 1794, at Canandaigua, New York, Timothy Pickering, acting as commissioner on behalf of the United States, (7 Stat. 44,) it was agreed that the lands of the Senecas situated in the western part of the State of New York, described in the treaty, (embracing the land in controversy,) "shall remain theirs until they choose to sell to the people of the United States who have the right to purchase."

At one point in time the Senate refused to ratify a Seneaca Treaty (*Seneca Nation v. Christie*, 126 N.Y. 122, 130):

> "The senate, on receiving the communication from the president, referred the "treaty with the Seneca Indians" to the committee on Indian affairs, and afterwards on its being reported back to the senate, that body refused to ratify it, but the senate passed an explanatory resolution as follows: *Resolved*, That by the refusal of the

> Senate to ratify the treaty with the Seneca Indians, it is not intended to express any disapprobation of the terms of the contract entered into by the individuals who are parties to that contract, but merely to disclaim any power over the subject-matter."

The Senecas and Oneidas have identically worded but separate clauses in the Treaty of Canandaigua.

Seneca Nation v. Christy, 162 U.S. 283 16 S.Ct. 828 (1896): *Seneca Nation v. Christie*, 126 N.Y. 122 was the considered the leading case and final resolution of the approval issue for about 100 years as vesting title to New York in the questioned land transactions.

This clause from the Treaty of Canandaigua and its interpretation but the courts are are mentioned several other times; most notably in *The New York Indians*, 72 U.S. 761 (1866) and several New York cases: *Jemison v. Bell Telephone Co.*, 186 N.Y. 493 (1906) 79 N.E. 728: *Thurston v. Miller*, 140 Misc. 471 250 N.Y.S. 728 (1930): *Seneca Nation v. Christie*, 126 N.Y. 122. The cases reflect the traditional resolution of the issue of federal approval of New York transactions with the Indians in favor of New York. The facts are not re-reasoned in terms of modern legal principals which produce the same result on a different basis (*supra*). The State of New York has a unique position in that it exercised exclusive sovereignty over the New York Indians.

The land owners should not be made victims of fickle, vacillating federal policies over the last 200

years. They have been threatened with ejectment. They have had to pay the taxes the Oneida Nation refuses to pay to maintain services to that the Oneida Nation uses. They were the ones who were put out of business when the Oneida Nation targeted a business and undercut the non indian businesses by refusing to collect the taxes. They have a right to settled economic conditions.

On September 15, 1795 the Oneidas conveyed their first "Indenture" to the State of New York and continued conveying in numerous transactions until 1842. The Federal government had representatives in the area that knew of the sales and were listed as present at many of the treaties. The Senate never stopped the conveyances for 50 years which is a good indication of a de facto approval.

A full history of these matters is set forth in the brief of the Attorney-General of the United States attached at Appendix aa4-aa14. Briefly summarized the key historical facts appearing there indicate a war was about to break out with the Iroquois over Presque Isle. The English were pushing for war. But the Federal indian agent Thomas Pickering was attempting to prevent war. So, he convened a counsel of the iroquois tribes in Canandaigua. The Oneidas were concerned that the change in government from the confederacy to a constitutional government might negate their previous Treaties under the Articles of Confederation. The Oneidas wanted their rights reaffirmed as of the time of the Treaty of Fort Schuyler under the Articles of Confederation. The indians requested Pickering codify their rights in the Treaty of Canandaigua

as they had been under the Treaty of Fort Schuyler including including the right to sell their land to individual United States citizens without federal approval. A right they had had under the Articles of Confederation. So, Pickering wrote a clause 2 into the treaty stating that the lands the indians have are theirs, the lands the states have are the states and the people of the United States can purchase directly from the Indians until they choose to sell. His opinion was that the United States had no interest in the land because they did not own the right of pre emption, which resided in either Massachusetts or New York. So the Federal Government suffered no loss. He prevented a war and was appointed Secretary of War. (See attached brief of the Attorney General in the Oneida Court of claims case)(Appendix aa4-aa14).

In 1788 New York State purchased the entire Oneida Indian Reservation and reserved 300,000 acre Oneida state reservation in the Treaty of Fort Schuyler. This occurred under the Articles of Confederation, before the constitution was adopted by the States and the non intercourse act was passed. New York administered the tribe until they obtained federal recognition for a casino (*Sherrill v. Oneida Nation* 544 U.S. 197).

From 1795 to 1838 three theories were used by the federal government for procedures constituting federal approval of New York treaties. They were: 1. Congress needed to approve the treaties under the non intercourse act 2. having the Federal Indian agent at the treaties was sufficient under the non intercourse act and the Treaty of Canandaigua (Appendix aa23 & 24): 3. the Treaty of Canandaigua gave the indians the right to

convey land without federal approval because a treaty was the supreme law of the land (Appendix aa 15, Senator Sevier) At one time or another all three were applied and done. The federal agents are listed as persons present in many treaties and indentures. The question of how to interpret the Treaty clause in relation to Indian treaties before *The Cherokee Nation v. The State of Georgia*, 30 U.S. 1 (1831) also exists.

Originally, Indians were considered foreign nations and administered under the Department of War. Their treaties were considered treaties with a foreign nation under the treaty clause of the constitution. The concept of a Domestic Dependent Nation was decades away. This was before the decision of *The Cherokee Nation v. The State of Georgia*, 30 U.S. 1 (1831) when the court interpreted the constitution to divide constitutional entities into indian tribes, foreign entities and domestic dependent nations. This issue will never arise again. Why decide it?

These are arcane issues are mooted by history. New York State controls the area and has for 200 years. Resurrecting and resolving this dispute is socially and politically disruptive. (*supra* and *infra*).

Equitable principals of laches, good faith purchaser for value, impracticality, impossibility and laches lay to rest any claim of sovereignty of the Oneida Nation. The land claim is based on an arcane dispute that has been mooted by history. The claim is economically, socially and politically disruptive, impossible to enforce and inequitable in that 600 Oneidas with a de minims land presence are trying to obtain political control over 100,000 non indians on

300,000 acres. *The City of Sherrill v. Oneida Indian*, 544 U.S. 197: 125 S.Ct. 1478 (2005). If the Oneidas had a reservation it has been disestablished.

The unilateral purchases of the Oneida Nation of their disestablished reservation should be voided laying the matter to rest. This dispute should be laid to rest now forever.

III. ONEIDA NATION WAS NOT A FEDERALLY RECOGNIZED TRIBE AS OF 1934

The Lower Court referred to Indian trust proceedings in the Lower Court. The Department of Interior appears to be either in ignorance of or not in compliance with the Decisions of this Court that only Indian tribes listed in the Act allowing Indian trust status are entitled to those rights (*Carcieri v. Kempthorne-Narragasset Tribe* 129 US Supreme Court 1058 (2008)(attached hereto is the complete list of Federally recognized tribes as of 1934 and 1935 at aa26 to aa37). There is no Federally recognized tribes in New York as of 1939 (Appendix aa31 and aa32).

IV. SOVEREIGNTY ENDS AT THE RESERVATION LINE.

In any event, Indian sovereignty ends at the reservation line. The present premises are off Indian reservation. There the State of New York is sovereign. Needless to say, the Respondent reservations separated by considerable distance from each other, as is the present circumstance is chaotic.

V. KIOWA DOES NOT MANDATE SOVEREIGN IMMUNITY IN THIS CASE.

Kiowa Tribe of Okla v. Manufacturing Technologies, 523 U.S. 751 (1998) 118 S.Ct. 1700_in discussing private commercial transactions with Indians states:

> Our cases allowing States to apply their substantive laws to tribal activities are not to the contrary. We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973); see also *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962).

Since there is no Indian interest left in this region at all (see infra), Indian country or otherwise there is no sovereignty and therefor no immunity on sovereign state land.

CONCLUSION

The doctrine of tribal immunity from suit has outlived its reason and basis and needs to be withdrawn or modified to be restricted to internal tribal matters and to be eliminated from commercial matters and further to be non-applicable to any governmental relations with the sovereign State of New York.

The original reservation has been placed on the market and sold according to Congressional approved

treaty has been disestablished and cannot be reestablished and off reservation transactions are void.

Respectfully submitted,

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A TREATY BETWEEN THE UNITED STATES AND THE TRIBE OF INDIAN CALLED THE SIX NATIONS

***The President of the United States, having determined to hold a conference with the Six Nations of Indians for the purpose of removing from their minds all causes of complaint and establishing a firm and permanent friendship with them, and Timothy Pickering being appointed sole agent for that purpose, and the agent having met and conferred with the sachems, chiefs and warriors of the Six Nations in a great council, now, in order to accomplish the good design of this conference, the parties have agreed on the following articles, which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations:

Article 1. Peace and friendship are hereby firmly established, and shall be perpetual between the United States and the Six Nations.

Article 2. The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga nations, in their respective treaties with the State of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but the said reservation shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase.

Article 3. The land of the Seneka nation is bounded as follows:

Beginning on Lake Ontario, at the northwest corner of the land they sold to oliver Phelps, the line runs westerly along the lake as far as O-young-yeh Creek, at Johnson's Landing Place, about four miles eastward from the fort of Niagara; thence southerly up that creek to its main fork; then straight to the main fork of Stedman's Creek, which empties into river Niagara about Fort Schlosser, and then onward from that fork, continuing the same straight course, to that river (this line from the mouth of O-young-wong-yeh Creek to the river Niagara, above Fort Schlosser, being the eastern boundary of a strip of land extending from the same line to Niagara river which the Seneka Nation ceded to the king of Great Britain, at a treaty held about thirty years ago, with Sir William Johnson); then the line runs along the river Niagara to Lake Erie; then along Lake Erie to the northeast corner of a triangular piece of land which the United States conveyed to the State of Pennsylvania, as by the President's patent, dated the third day of March, 1792; then due south to the northern boundary of that State; then due east to the southwest corner of the land sold by the Seneka Nation to Oliver Phelps; and then north and northerly along Phelps' line to the place of beginning on Lake Ontario. Now, the United States acknowledge all the land within the aforementioned boundaries to be the property of the Seneka Nation; and the United States will never claim the same, nor disturb the Seneka Nation, nor any of the Six Nations, or of their Indian friends residing thereon, and united with them in the free use and enjoyment thereof; but it shall remain theirs until they choose to sell the name of the people of the United States, who have the right to purchase.

Article 4. The United States having thus described and acknowledged what lands belong to the

Oneidas, Onondaga, Cayuga and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof, now, the Six Nations, and each of them, hereby engage that they will never claims any other lands within the boundaries of the United States, not over disturb the people of the United States in the free use and enjoyment thereof.***

Docket No.: 301
INDIAN COURT OF CLAIMS

THE ONEIDA NATION OF NEW YORK, et al.,

v.

UNITED STATES

BRIEF IN SUPPORT OF SUMMARY JUDGMENT BY ASSISTANT ATTORNEY GENERAL PERRY W. MORTON [EXCERPT PAGES 43-53]

***Hostilities with the western Indians still continued throughout this period and in 1794 there appeared to be danger that the New York Indians, or at least the Senecas, might take up arm against the United States. The matter which precipitated a crisis in relations with the New York Indians was action taken by Pennsylvania toward establishing a town at Presqu' Isle (Presqu' Isle is the present site of the city of Erie, Pennsylvania, and is within the so-called Erie Triangle, see supra pp. 9-10). On April 8, 1793, the General Assembly of Pennsylvania, stating that "Whereas establishing a town at Presqu' Isle would promote the settlement of the neighboring country and thereby place the frontiers of Pennsylvania in a safer position," enacted legislation authorizing the laying out of a town at Presqu' Isle (Ex. 46, p. 503). When surveyors and garrisons were sent to the area, the Indians indicated sufficient hostility to alarm the President. Accordingly, acting through the Secretary of War, he requested on

May 24, 1794, that the establishment at Presqu' Isle be suspended (Ex. 47). The Governor of Pennsylvania, deferring to the general government on a matter of war and peace, readily complied (Ex. 46 p. 506; Ex. 47, p. 713). In June the Indians held a council at Buffalo Creek which was attended by General Israel Chapin, United States, United States Indian Agent in New York (Ex. 48). Chapin reported that the Indians were particularly agitated regarding Presqu' Isle (Ex. 48) and suggested that a treaty be held with the Six Nations to settle their differences with the United States (Ex. 48, pp. 520-521). It was thereupon determined to hold a treaty "for the purpose of amicably removing all causes of misunderstanding and establishing permanent peace and friendship between the United States and the Six Nations (Exes. 49, 50). Timothy Pickering, who was appointed to act as commissioner on behalf of the United States, held a conference at Canandaigua, New York, which resulted in the Treaty of November 11, 1794 (7 Stat. 44. Ex. 52).

(b) The Treaty of 1794. By Article I of this treaty, peace and friendship were established between the United States and the Six Nations.

Article II provides as follows:

The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but the said reservation shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

The reservations referred to, and the treaties with the state of New York by which they were created, are set forth supra, pp. 16-17.

Article III provides as follows:

The land of the Seneka nation is bounded as follows: Beginning on Lake Ontario, at the north-west corner of the land they sold to Oliver Phelps, the line runs westerly along the lake as far as O-young-wong-yeh Creek, at Johnson's Landing-place, about four miles eastward from the fort of Niagara; then southerly up that creek to its main fork, then straight to the main fork of Steadman's creek, which empties into the river Niagara, above forth Schlosser, and then onward, from that fork, continuing the same straight course, to that river; (this line, from the mouth of O-young-wong-yeh Creek to the river Niagara, above fort Schlosser, being the eastern boundary of a strip of land, extending from the same line to Niagara river, which the Seneka nation ceded to the King of Great-Britain, at a treaty held about thirty years ago, with Bir William Johnson;) then the lines runs along Lake Erie to the north-east corner of a triangular piece of land which the United States conveyed to the state of Pennsylvania, as by the President's patent, dated the third day of March, 1792; then due south to the northern boundary of that state;then due east to the south-west corner of the land sold by the Seneka nation to Oliver Phelps; and then north and northerly, along Phelp's line, to the place of beginning on Lake Ontario. Now, the United States acknowledge all the land within the aforementioned boundaries, to the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but is

shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

Thus, it appears that the eastern boundary of the lands acknowledged as belonging to the Senecas was the western boundary of the lands sold by the Six Nations to Phelps and Gorham on July 8, 1788, as set out supra pp. 13-14. I also appears that part of the lands acknowledged to belong to the Senecas were west of the boundary line established at Fort Stanwix in 1784 and that the United States, by acknowledging them as Seneca lands, relinquished the rights ceded to it at Fort Stanwix (see Exhibit B showing the Fort Stanwix boundary line and the wester boundary of the Seneca lands as acknowledged in the treaty at Canandaigua).

Article IV of the treaty provided as follows:

The United States having thus described and acknowledged with lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.

Inasmuch as the lands acknowledged as belonging to the New York Indians lay entirely within the state of New York, the effect of the Indian engagement never to claim any other lands within the boundaries of the United States was to relinquish any claim to the disputed Erie Triangle, as well as to any

other lands in Pennsylvania or elsewhere in the United States.

The Treaty of Canandaigua is no wise divested or impaired the rights of the states of New York or Massachusetts, nor did it enlarge the rights of the Indians. See option of Attorney General Wirt, March 26, 1819 (Ex. 58, pp. 475-476); see also opinion of Richard Harrison, April 6, 1819 (Ex. 58, pp. 471, 475).

It is apparent on its face that the treaty was not intended to and did not create any greater rights in the Indians than had existed previously, with the exception of the area referred to above which lay between Fort Stanwix line and the western boundary of the Seneca lands as described in the Canandaigua treaty. In the first place it recognizes the right of the state and Phelps and Gorham to purchase Indian title by describing the lands currently belonging to them by reference to the trans-actions which had occurred previously between the Indians and the states of Massachusetts and New York and Phelps and Forham. And the very language used to spell out the undertaking by the United States in an explicit acknowledgement of that right. The treaty says "the United States will never claim the same nor disturb *** [the Indians] *** in the free use and enjoyment thereof: but it shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase." No other Indian treaty has been found which contains any such provision recognizing the right of the Indians to sell their lands to anyone other than the United States. This provision was an acknowledgment of the then well-known fact that either New York or those who had purchased the preemption rights from Massachusetts had the right to purchase the Indian lands. Moreover, it was an

acknowledgment that the Indians were free to sell their lands if they chose and that the United States was placing no restrictions upon such sales to those "who have the right to purchase." Furthermore, it is a recognition of the fact that the laws of New York (Exs. 1, 31), the treaties between New York and the Indians (e.g., Ex. 21), and the Hartford Compact (Ex. 26, p. 466) all placed restrictions on the purchase of Indian lands and that only certain persons had "the right to purchase". It is difficult to see how there can be read into the provisions of this treaty a guarantee by the United States that the Indians would be kept in possession of their lands in perpetuity or that the United States would see to it that they would receive any particular price for their lands why they sold them to New York or to the grantees of Massachusetts.

That the foregoing is the proper interpretations of the Treaty of Canandaigua is apparent from a draft of a letter dated December 26, 1974, from Pickering, the United States Commissioner, to Secretary of War Knox (Ex. 54).

As appears on Exhibit B attached hereto, part of the lands to which the Six Nations relinquished any claims at the Treaty of Fort Stanwix lay within the boundaries of the state of New York. In describing the lands which the United States by the Treaty of Canandaigua acknowledged to belong to the Seneca, Pickering bounded them on the west by a line which was west of the line laid down by the Fort Stanwix treaty. The effect, as has already been mentioned, was to relinquish any claim of the United States to an area within the state of New York lying between the two lines. When Knox received a copy of the Treaty of Canandaigua he apparently asked Pickering to explain why he had relinquished the right of the United States

to these lands. A draft of Pickering's reply (Ex. 54) is found among the Pickering Papers which are in the custody of the Massachusetts Historical Society in Boston.

Pickering gave his reason as follows:

1. I knew that the U. States had no right to any part of the Seneka County, but by virtue of the cession made by the States of New York & Massachusetts, which congress had accepted.

2. I knew that the line of cession, when ascertained by Mr. Elliot, was what now constitutes the eastern boundary of the triangular piece of land which the U. States sold to Pennsylvania. **and consequently that the U. States had no right to one feet of the land in question**.

3. I knew that by the agreement between the two states of New York & Massachusetts, the pre-emption right to all the lane in question belonged to Massachusetts; excepting a strip, a mile wide, along the strait of Niagara, which I understood New York was to retain; and that the whole lay within the Jurisdiction of New York.

4. I knew that by Constitution of the State of New York, no purchase or contract for the sale of lands **within the state** made of or with the Indians, within the limits of that state, could be binding on the Indians, or deemed valid, unless made under the authority and with the consent of the legislature of that state. And from the nature of the case, I knew that such authority & consent could never have been given, in regard to the lands in question, when, they were in the terms of the treaty of Fort Stanwix, they were ceded to the United States.

5. I knew, therefore, that the United State had no proper title or right to the lands which I relinquished. In trust, when I proposed to give up the tract between the Pennsylvania Triangle and the Meridian of the Mouth of Buffaloe Creek, I felt myself embarrassed-not in making the relinquishment itself-but for words to express it when should not be deceptive, **For while it might ----------to impress the minds of the Indians with an idea that the relinquishment was of** by presenting an idea of something very valuable while in fact the subject of the relinquishment was a shadow. THe words used in my speech were these -- "All this tract you, by former treaties ceded to the United States: but i am now willing to relinquish all their claim to it."

6. I knew the practical construction of New York Constitution on this point. John Livingston and other obtained from the Six Nations a vast cession of land within that state, which had been made void, because done without the Consent of the Legislature. and I considered that the United State had no better rights that individuals to **acquire a property in the same Indian lands**-receive from the Indians (words crossed out) a cession of the same lands.

7. It is true, that I strenuously endeavored to obtain the strip of land four miles wide, along the strait of Niagara; and I also inserted an article to comprehend the land round the Fort of Oswego, to the extent of six miles square-because the same had been comprehended in the treaty of fort Stanwix, but not seeing how the United States exclusively could hold these lands I had draughted another article, in these words, "All the cessions & relinquishments of the rights & claims of the Six Nations & each of them hereby made, shall be for the benefit of the United States & any of them, and of

any citizen or citizens thereof; to whom, accordingly to their laws and usages, the right of taking & holding the same, does or shall belong." -- The form which the treaty finally assumed, superseded this provision.

8. The objects of my mission to my conference with the Six Nations were, to remove from their minds all causes of complaint and to establish a firm & permanent friendship.

The great cause (words crossed out) of complaint, from all the Indian Nations, Nations, it is too well know, has been the unreasonableness depriving them of their lands, by means not always honorable (words crossed out) too often fraudulent, & sometimes to an unreasonable extent.

The Six Nations, particularly the Senekas, have frequently complained of the treaty of Fort Stanwix. Their complaints of that & of the subsequent treaties on the Ohio were renewed at the late conference.

Pickering went on to discuss the complaints of the Indians in this regard and expressed his belief that he was further justified in making the relinquishment because the purpose f the treaty was to settle differences with the Indians in order to preserve peace whereas to insist upon the kinds of extinguishment of Indian title as had been obtained at Fort Stanwix would be to risk war.

On behalf of the foregoing it is obvious that Pickering was fully aware of the fact that the states, not the United States, has title to the lands, that he was aware of the New York-Massachusetts Compact, and of the New York laws prohibiting purchases of Indian lands without the consent of the state. It is further clear that when he acknowledged certain lands to belong to the Indians he was recognizing their rights as derived from the states, that

when he said that "the United States will never claim the same" he was relinquishing any rights previously acquired at Fort Stanwix by right of conquest and promising that "the United States" would assert no future claims to their lands and that when he said that the lands "shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase" he acknowledged both the right of the Indians to sell and the right of the states or their grantees to purchase. It was a recognition of rights which already existed and a disclaimer of any rights in the United Staes to interfere. It was not an affirmative undertaking by the United States to take action of any kind much less to indemnify the Indians if it failed to take some undefined action.

Between 1794 and about 1850 numerous purchases of lands claimed by the Indians in New York were made either by the state of New York of the owners of the right of preemption which they had acquired by grant from the state of Massachusetts. As to these purchases, petitioners make the same contentions made regarding the Treaty of Fort Stanwix in 1784 (see supra p. 35), i.e., that defendant failed in its duty expressed in the Treaty of 1794 to protect petitioners and keep them secure in the use and possession of their lands and that it failed to lend any aid or assistance to petitioners but permitted them to be exploited and to be unconscionably deprived of their lands for a grossly inadequate consideration (Docket No. 300A, Pet. par. 11; Docket No. 301, Pet. pars. 20, 25, 30, 45, 50, 52; Docket No. 342, Pet pars. 18, 23, 36, 65, 70, 86, 91, 95, 106; Docket No. 343; Pet pars. 16, 20). As we have shown, the Treaty of Canandaigua clearly contemplated the sales which were subsequently made and the United States undertook no obligation with

reference thereto. Consequently, there is no basis for imposing any liability upon the United State for claim arising out of such sales.

Finally, a few claims are based upon alleged trespasses and other wrongful acts by third persons. What has been said with reference to the purchases is ample to show that the United States cannot be held liable for these claims. ***

APPENDIX TO THE CONGRESSIONAL GLOBE
PG. 290

Treaty with the New York Indians-Mr. Sevier.

***Mr. President, in considering the various interests involved in this treaty-the interests of the Senecas, of the citizens of New York, and of the grantees of Massachusetts-the committee have thought it their duty to consider, in connection with those interests, the interest of a fourth part, which is that of the United States. And with a view to understand this complicated affair, the committee have endeavored to trace our relations with the Six Nations of New York, from their commencement up to this day, so far at least as the Senecas are concerned , for the purpose of discovering if there be on our part any undischarged obligations to either of the parties interested in the subject-matter now before us. The first treaty which I have been able to find with the Six nations of New York, was concluded in 1784. That was a treaty of peace; a relinquishment of territory on their part, and definition of their boundary lines on ours. In 1789, five year thereafter, a second treaty was made, which is, so far as I have been able to discover, but little more, if any thing, than a recapitulation of the former one.

The third one last treaty ever made by us with the Six Nations of New York, in their confederated character, (unless the one we are now considering should constitute a single exception,) was made in 1794. This was an important treaty, and has governed us in all our intercourse with them ever since. In that treaty, we acknowledge separately to each of the tribes composing the Six Nations, their individual right and title to certain specific reservations of land; and we guarantied to them separately the possession

and employment of their respective reservations; and con erred upon them the right to dispose of their reservations respectively, in whole or in part, to any citizen or citizens of the United States, whenever and however they might choose ; and for these rights , the Indians, on their part, engaged, in the same treaty, never to set up any claim to any other lands in the boundaries of the United States, than those granted in that treaty.

This was the last treaty ever made by us with those Indians, collectively or separately, from 1794 to 1838; a period of more than forty years. From that time onward, to 1838, we acted in good faith, and permitted those Indians, according to the terms of the treaty in 1794, so far at least as to the Senecas were concerned, to dispose of their New York lands as they chose.

Since 1794, the Senecas have disposed of their lands on several occasions. In 1797 , they were permitted to sell to Robert Morris of Philadelphia a portion of their reservations. Afterward, in 1802 the same Senecas were permitted to sell another portion of their lands to Phelps, Bronson, and Jones; and again, in the same year, to Wilhelm Willick and others; and again, in 1823, to Grigg and Gibson. Each and all of those sales were made openly, freely, and voluntarily, and under the guardian care only of the United States on the one hand, and of the agent , or superintendent, of the Sale of Massachusetts on the other. These lands were transferred by the Indians to the grantors, not by treaty, but by the ordinary deeds of conveyance; nor does the transfer to those lands to Ogden and Fellows, in 1838, vary in a degree, but in the prefixture of a preamble to it, from all the other deeds of conveyance which have been made by them subsequent to 1794.

Having then, as we have seen by the treaty of 1794, such ample power to dispose of these lands a power so often and so satisfactorily exercised by them; and the United States having no interest whatever in these lands, and being constitutionally incapable of having any, and not being bound by compact, as in the case of Georgia, to extinguish the Indian title to those lands, it may well be asked, why have we interred in this affair? Why have we attempted, with unabated assiduity, for more than two years, with our influence, with our agents, and means, and money, to barter with those Indians for their New York reservations? I will endeavor, sir, to unravel this mystery; it is a curious piece of intrigue and history, which should never be forgotten, as it may be of some service to the country hereafter.***

SENATE EXECUTIVE JOURNAL-FRIDAY, JANUARY 2, 1795

The following written messages were received from the President of the United States, by Mr. Dandridge, his Secretary:

United States, January 2nd, 1795

Gentlemen of the Senate:

A spirit of discontent, from several causes, arose in the early part of the present year, among the Six Nations of Indians, and particularly on the ground of a projected settlement by Pennsylvania, at Presque Isle, upon Lake Erie. The papers, upon this point, have already been laid before Congress. It was deemed proper, on my part, to endeavor to tranquillize the Indians, by pacific measures. Accordingly, a time and place was appointed; at which a free conference should be had, upon all the causes of discontent, and an Agent was appointed, with the instructions of which No. 1, herewith transmitted, is a copy.

A numerous assembly of Indians was held in Canandaigua, in the State of New York, the proceedings whereof accompany this message, marked No. 2.

The two treaties, the one with the Six Nations, and the other with the Oneida, Tuscorora, and Stockbridge Indians, dwelling the country of the Oneidas, which have resulted from the mission of the Agent, are herewith laid before the Senate, for their consideration and advice.

The original engagement of the United States to the Oneidas, is also sent herewith.

Go. WASHINGTON.

United States, January 2d, 1795.

Gentlemen of the Senate:

I nominate Timothy Pickering, to be Secretary for the Department of War, vice Henry Knox, who has resigned that office.

Go. WASHINGTON.

Ordered, That they lie for consideration.

It was agreed, by unanimous consent, to dispense with the rule, and proceed to the consideration of the nomination of Timothy Pickering to be Secretary for the Department of War; and

Resolved, That the Senate advise and consent to the appointment; agreeable to the nomination.

Ordered, That the Secretary lay this resolution before the President of the United States.

25 U.S.C. Sec. 233
JURISDICTION OF NEW YORK STATE COURTS IN CIVIL ACTIONS

The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State; Provided, That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs i involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts; Provided further, That nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom: Provided further, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for the State or local purposes, nor as subjecting any such lands, or any Federal or State

annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land; And provided further, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or bank of Indians of any lands within any Indian reservation in the State of New York: Provided further, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952.

EFFECTIVE DATE

Section 2 of the act Sept. 13, 1950, provided: "This Act [this section] shall take effect two years after the date of its passage [Sept. 13, 1950]."

25 U.S.C. Sec. 232

JURISDICTION OF NEW YORK STATE OVER OFFENSES COMMITTED ON RESERVATIONS WITHIN STATE.

The State of New York Shall have jurisdiction over offenses committed by or against Indians or Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State: Provided, That nothing contained in this section shall be construed to deprive any Indian tribe, band or community, or members thereof, hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights.

(July 2, 1948, ch. 809, 62 State, 1224.)

No. 97.

THE SIX NATIONS.

Communicated to the Senate, March 10, 1802

Gentlemen of the Senate:

The Governor of New York has desired that, in addition to the negotiations with certain Indians, already authorized, under the superintended of John Tayler, further negotiations should be held with the Oneidas, and other members of the confederacy of the Six Nations, for the purchase of lands in, and for, the State of New York which they are willing to sell, as explained in the letter from the Secretary of War, herewith sent. I have, therefore, thought it better to name a commissioner to superintend the negotiations specified, with the Six Nations, generally, or with any of them.

I do, accordingly, nominate John Tayler, of New York, to be commissioner for the United States, to hold a convention or conventions between the State of New York and the confederacy of the Six Nations of Indians, or any of the nations composing it.

This nomination, if advised and consented to by the Senate, will comprehend and supersede that of February 1st, of the same John Tayler, so far as it respected the Seneca Indians.

March 9th, 1802.

TH. JEFFERSON

War Department, 5th March, 1802.

Sir:

Governor Clinton, by his letter of the 20th ultimo, requests that a commissioner, on the part of the United States, might be appointed to attend a treaty with the Oneida Indians or the purchase of about ten thousand acres of land, which that nation is desirous of selling, and which has, heretofore, been leased out to white people.

The Six Nations have also expressed a wish to dispose of a narrow strip of land, which they consider as useless to them, bordering on Niagara river, and a small tract near the former Cayuga settlement.

Accept. sir. the assurance of mv high respect and consideration.

aa25

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of Indian Affairs
Washington

10/16/39

The following list shows Indian tribes, grouped by states, which are under Constitutions and Charters, as approved by the Secretary of the Interior in accordance with the provisions of the Indian Reorganization Act, the Oklahoma Indian Welfare Act, and the Alaska Act. The listed dates show when the Constitutions and Charters went into effect.

N.	Reservation	Official Name	Constitution Approved	Charter Ratified	Tot. Pop.
	Arizona				
1	San Carlos	The San Carlos Appache Tribe	1/17/36		3017
2	Pima	The Gila River Pima-Maricopa Indian Community	5/14/36	2/28/38	4586
3	Ft. McDowell	The Ft. McDowell Mahave-Apache Community	11/24/36	6/6/38	195
4	Hopi	The Hopi Tribe	12/19/36		3325
5	Gila Bend, San Xavier, Sells	The Papago Tribe	1/6/37		5656
6	Campe Verde	The Yavapai-Apache Indian Community	2/12/37		419
7	Colorado River	The Colo. River Indian Tribes of the Colo. River Reservation, Arizona and California	8/13/37		1212
8	Ft. Apache	The White Mountain Apache Tribe	8/26/38		2811

9	Hualapai	The Hualapi Tribe of the Hualapai Reservation	12/17/38		459
10	Havasupai	The Havasaupai Tribe of the Havasupai Reservation	3/27/39		207
				Total:	21887
	California				
1	Big Valley	The Big Valley Band of Pomo Indians of The Big Valley Rancheria	1/15/36		92
2	Upper Lake	The Upper Lake Band of Pomo Indians of the Upper Lake Rancheria	1/15/36		72
3	Wilton	The Me-wuk Indian Community of the Wilton Racheria	1/15/36		28
4	Tule River	The Tule River Indian Tribe	1/15/36		196
5	Tuolumne	The Tuolumne Bank of Me-wuk Indians of the Tuolumne Rancheria	1/15/36	11/12/37	80
6	Ft. Bidwell	The Fort Bidwell Indian Community	1/28/36		128
7	Stewart's Point	The Kashia Band of Pomo Indians of the Stewart's Point Rancheria	3/11/36		140

8	Manchester	The Manchester Band of Pomo Indians of the Manchester Rancheria	3/11/36	2/27/37	92
9	Round Valley	The Covelo Indian Community	12/16/36	11/6/37	838
10	Ft. Yuma	The Quechan Tribe	12/18/36		852
11	Quartz Valley	The Quartz Valley Indian Community	6/15/39		29
				Total:	2547
	Colorado				
1	Southern Ute	The Southern Ute Tribe of the Southern Reservation	11/4/36	11/1/38	403
	Idaho				
1	Ft. Hall	The Shoshone-Bannock Tribes of the Fort Hall Reservation	4/30/36	4/17/37	1847
	Iowa				

1	Sac & Fox	The Sac & Fox Tribe of the Mississippi in Iowa	12/20/37		460
	Kansas				
1	Iowa	The Iowa Tribe in Nebraska & Kansas	2/26/37	6/19/37	537
2	Kickapo	The Kickapo Tribe in Kansas	2/26/37	6/19/37	342
3	Sac & Fox	The Sac & Fox Tribe of Missouri	3/2/37	6/19/37	127
				Total:	1006
	Michigan				
1	Hannahville	The Hannahville Indian Community	7/23/36	8/21/37	108
2	Bay Mills	The Bay Mills Indian Community	11/4/36	11/27/37	09
3	L'Anse	The Keweenaw Bay Indian Community	12/17/36	7/17/37	1116
4	Isabella	The Saginaw Chippewa Indian Tribe of Michigan	5/6/37	8/28/37	800
				Total:	2133

	Minnesota				
1	Lower Sioux	The Lower Sioux Indian Community in the State of Minnesota	6/11/36	7/1/37	192
2	Prairie Island	The Prairie Island Indian Community in the State of Minnesota	6/20/36	7/23/37	94
3	Consolidated Chippewa	The Minnesota Chippewa Tribe	7/24/36	11/13/37	13232
				Total:	13518
	Montana				
1	Flathead	The Confederated Salish and Kootenai Tribes of the Flathead Reservation	10/28/35	4/25/36	3114
2	Rocky Boy's	The Chippewa Cree Tribe of the Rocky Boy's Reservation	11/23/35	7/25/36	672
3	Tongue River	The Northern Cheyenne Tribe	11/23/35	11/7/36	1573

4	Blackfeet	The Blackfeet Tribe of the Blackfeet Indian Reservation	12/13/35	8/15/36	4348
5	Ft. Belknap	The Ft. Belknap Indian Community	12/13/35	8/25/37	1540
				Total:	11247
	Nebraska				
1	Omaha	The Omaha Tribe of Nebraska	3/3036	8/22/36	1700
2	Ponca	The Ponca Tribe of Native Americans	4/3/36	8/15/36	391
3	Santee	The Santee Sioux Tribe of Nebraska	4/3/36	8/22/36	1290
4	Winnebago	The Winnebago Tribe of Nebraska	4/3/36	8/15/36	1238
				Total:	4619
	Nevada				
1	Reno-Sparks	The Reno-Sparks Indian Colony	1/15/36	1/7/38	190
2	Pyramid Lake	The Pyramid Lake Paiute Tribe	1/15/36	1/7/38	190
3	Washoe	The Washoe Tribe	1/24/36	2/27/37	150
4	Western Shoshone	The Shoshone-Paiute Tribes of the Duck Valley Reservation	4/20/36	8/22/36	545

5	Ft. McDermott	The Ft. McDermott Paiute and Shoshone Tribe	7/2/36	11/21/36	258
6	Yerington	The Yerington Paiute Tribe	1/4/37	4/10/37	134
7	Walker River	The Walker River Paiute Tribe	3/26/37	5/8/37	501
8	The Te-Moak	The Te-Moak bands of Western Shoshone Indians	8/24/38	12/12/38	80
				Total:	2417
	New Mexico				
1	Santa Clara	The Pueblo of Santa Clara	12/20/35		450
2	Mescalero	The Apache Tribe of the Mescalero Reservation	12/25/36	8/1/36	762
3	Jicarilla	The Jicarilla Apache Tribe of New Mexico	8/4/37	9/4/37	727
	North Dakota				
1	Ft. Berthold	The Three Affiliated Tribes of the Fort			

		Berthold Reservation	6/29/36	4/24/37	373
	Oregon				
1	Grande Ronde	The Confederated Tribes of the Grand Ronde Community	5/13/36	8/22/36	373
2	Warm Springs	The Confederated Tribes of the Warm Springs Reservation	2/14/38	4/23/38	779
	Oklahoma				
1	Seneca-Cayuga	The Seneca-Cayuga Tribe of Oklahoma	4/26/37	6/26/37	748
2	Wyandotte	The Wyandotte Tribe of Oklahoma	7/17/37	10/30/37	786
3	Cheyenne and Arapaho	The Cheyenne-Arapaho Tribes of Oklahoma	8/25/37		2848
4	Kickapoo	The Kickapoo Tribe of Oklahoma	9/18/37	1/18/38	262
5	Iowa	The Iowa Tribe of Oklahoma	10/23/37	2/7/38	977
6	Sac & Fox	The Sac & Fox Tribe of Indians of			

		Oklahoma	12/7/37		875
7	Pawnee	The Pawnee Indians of Oklahoma	1/6/38	4/28/38	977
8	Caddo	The Caddo Indian Tribe of Oklahoma	1/17/38	11/15/38	993
9	Tonkawa	The Tonkawa Tribe of Indians of Oklahoma	4/21/38		52
10	Ottawa	The Ottawa Tribe of Oklahoma	11/30/38	6/2/39	426
11	Absentee-Shawnee	The Absentee Shawnee Tribe of Indians of Oklahoma	12/5/38		653
12	Potawatomi	The Citizin band of Potawatomi Indians of Oklahoma	12/12/38		2627
13	Thlopthlocco	Thlopthlocco Tribal Town	12/27/38	4/13/39	380
14	Alabama-Quassarte	The Alabama-Quassarte Tribal Town	1/10/39	5/24/39	150
15	Miami	The Miami Tribe of Oklahoma	1/10/39		287
16	Peoria	The Peoria Tribe of Indians of Oklahoma	10/10/39		372
	South Dakota				

1	Lower Brule	The Lower Brule Sioux Tribe	11/27/35	7/11/36	613
2	Rosebud	The Rosebud Sioux Tribe	12/20/35	3/16/37	6752
3	Cheyenne River	The Cheyenne River Sioux Tribe	12/27/35		3490
4	Pine Ridge	The Oglala Sioux Tribe of the Pine Ridge Reservation	1/15/36		8776
5	Flandreau	The Flandreau Santee Sioux Tribe	4/24/36	10/31/36	348
				Total:	19979
	Texas				
1	Alabama-Coushatta	The Alabama-Coushatta Tribes of Texas	8/19/38		326
	Utah				
	Uintah & Ouray	The Ute Indian Tribe of the Uintah and Ouray Reservation	1/19/37	8/10/38	1304

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	Washington				
1	Tulalip	The Tulalip Tribes	1/24/36	10/3/36	673
2	Swinomish	The Swinomish Indian Tribal Community	1/27/36	7/25/36	302
3	Puyallup	The Puyallup Tribe	5/13/36		319
4	Muckleshoot	The Muckleshoot Indian Tribe	5/13/36	10/31/36	193
5	Makah	The Makah Indian Tribe	5/16/36	2/27/37	408
6	Quileute	The Quileute Tribe of the Quileute Reservation	1/11/36	8/21/37	286
7	Skokomish	The Skokomish Indian Tribe of the Skokomish Reservation	5/3/38	7/22/39	211
8	Kalispel	The Kalipsel Indian Community of the Kalispel Reservation	3/24/38	5/28/38	97
9	Port Gamble	The Port Gamble Indian Community	9/7/39		192
				Total:	2681
	Wisconsin				

1	Red Cliff	The Red Cliff Bank of Lake Superior Chippewa Indians	6/1/36	10/24/36	624
2	Bad River	The Bad River band of the Lake Superior Tribe of Chippewa Indians of the State of Wisconsin	6/20/36	5/21/38	1215
3	Lac du Flambeau	The Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin	8/15/36	5/8/37	877
4	Oneida	The Oneida Tribe of Indians of Wisconsin	12/21/36	5/1/37	3249
5	Wisconsin Potawatomi	The Forest County Potawatomi Community	2/6/37	10/30/37	301
6	Stockbridge	The Stockbridge-Munsee Community	10/30/37	5/21/38	600
7	Mole Lake	The Sokaogon Chippewa Community	11/9/38	10/7/39	187
				Total:	7053
				Grand Total:	110791
1	Hydaburg	The Hydaburg Cooperative Association			

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		of Alaska	4/14/38	4/14/38	329
2	Klawock	The Klawock Cooperative Association of Alaska	10/4/38	10/4/38	277
3	Craig	The Craig Community Association of Craig Alaska	10/8/38	10/8/38	201
4	Sitka	The Sitka community Association of Craig Alaska	10/11/38	10/11/38	620
5	Kasaan	The Organized Village of Kassan	10/15/38	10/15/38	83
6	King Island	The King Island Native Community	1/31/39	1/31/39	192
7	Atka	The Native village of Taka	5/23/39	5/23/39	91
8	Nikolski	The Native Village of Niolski	6/12/39	6/12/39	87
9	Wales	The Native Village of Wales	7/29/39	7/29/39	189
10	Shishmaref	The Native Village of Shishmaref	8/2/39	8/2/39	235
11	Karluck	The Native Village of Karluck	8/23/39	8/23/39	192
				Total:	2496

aa38

AMICUS CURIAE BRIEF

No. 10-72

IN THE

Supreme Court of the United States

MADISON COUNTY AND
ONEIDA COUNTY, NEW YORK,

Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, ALABAMA, COLORADO, FLORIDA, IDAHO, ILLINOIS, MICHIGAN, NEW MEXICO, NORTH DAKOTA, SOUTH DAKOTA, UTAH, AND WYOMING, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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22758

QUESTION PRESENTED

Whether, when a State or local government is authorized to impose real property taxes on real property owned by an Indian tribe, the government is nevertheless barred by tribal sovereign immunity from enforcing the tax through foreclosure or other *in rem* collection proceedings.

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INTEREST OF THE AMICI CURIAE

States have a vital interest in safeguarding the economic health of their local political subdivisions and, in particular, in ensuring that local governments can collect real property taxes that Indian nations are obliged to pay on taxable tribal lands. The Second Circuit's holding that the petitioner counties cannot enforce their real property taxes on tribally-owned land that this Court recently held to be taxable, *see City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), has rendered the property taxes uncollectible and jeopardized the financial health and well-being of the petitioners as well as of local governments in other parts of New York that were once occupied by Indian tribes. *See, e.g., Cayuga Indian Nation of N.Y. v. Gould*, 930 N.E.2d 233 (N.Y.) (addressing the status of lands recently acquired by the Cayuga Indian Nation of New York), *cert. denied*, 131 S. Ct. 353 (2010). In addition, the decision substantially restricts the power of the State and local governments to enforce their regulatory jurisdiction over taxable tribal lands.

The Second Circuit's reasoning also imperils real property tax collection throughout the United States because it permits Indian tribes nationwide to escape enforcement of lawfully imposed real property taxes. The States and their local subdivisions have a vital interest in continuing to enforce their tax and regulatory jurisdiction over lands they have governed without interruption for centuries.

SUMMARY OF THE ARGUMENT

In *Sherrill*, this Court rejected the claim of the Oneida Indian Nation of New York ("OIN") to "present and future sovereign immunity from local taxation" on lands that the OIN had recently acquired in the open market within an "area that once composed [its] historic reservation." *Id.* at 214, 202. The Court held that laches, acquiescence and impossibility barred the Oneidas' long-delayed assertion of sovereignty because of the substantial disruption to state and local governance the claim would cause. *See id.* at 202-03, 221. Moreover, the Court explained, over the objection of Justice Stevens in dissent, that this equitable bar applied whether the OIN was asserting sovereignty affirmatively in a declaratory judgment action or defensively in the suit by the city to evict the OIN for failure to pay property taxes. *Compare id.* at 214 n.7 (opinion of the Court) *and* 222 (Justice Souter concurring), *with* 225-26 (Justice Stevens dissenting).

Nevertheless, a panel of the Second Circuit has now held, without so much as mentioning the above statement in *Sherrill*, that this Court's earlier decisions in *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998), and *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991), compel the conclusion that "although the Counties may tax the property at issue here, *see City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), they may not foreclose on those properties because the tribe is immune from suit." Appendix to Petition for Certiorari, No. 10-72 ("Pet. App."), 33a (Judges Cabranes and Hall concurring). Two members of the

three-judge panel, in an opinion curiously labeled a "concurring opinion," acknowledged that this result is "anomalous" in view of *Sherrill* and "defies common sense" but believed that it is compelled by this Court's earlier tribal sovereign immunity precedents, which they called upon this Court "to reconsider." *Id.* at 32a-33a.

This Court should reverse. The Second Circuit's decision flies in the face of both the letter and the spirit of *Sherrill*. This Court has already held that the OIN is not immune from the city's eviction proceeding. *See* 544 U.S. at 214, n. 7 (opinion of the Court), 222 (Justice Souter concurring). In addition, tribal sovereign immunity is an attribute of tribal sovereignty generally, and thus, the distinction that the Second Circuit drew between tribal sovereign authority over land and tribal sovereign immunity is illusory. *See* Pet. App. 14a. In *Sherrill*, this Court used the terms "sovereign," "sovereignty" and "sovereign immunity" interchangeably. *See, e.g.*, 544 U.S. at 202, 213, 214. By upholding the OIN's claim of immunity here, the Second Circuit effectively denied the State and local governments the power to enforce against the OIN the regulatory jurisdiction that this Court in *Sherrill* ruled that they, not the OIN, exercise over the OIN's recently acquired lands. *See* 544 U.S. at 220 (granting tax immunity would also imply immunity "from local zoning or other regulatory controls that protect all landowners in the area"). The lack of effective enforcement would create the very disruption of "the governance of central New York's counties and towns" that this Court in *Sherrill* sought to avert. *Id.* at 202, *see also* 219 ("disruptive practical consequences"), 220 n.13 ("[o]ther tribal entities have already sought to free historic

reservation lands purchased in the open market from local regulatory controls"). For these reasons, *Sherrill* bars the OIN from asserting *any* sovereignty-based claims or defenses, including sovereign immunity from suit, with respect to State or local government proceedings to enforce their tax and regulatory jurisdiction over the OIN's recently acquired lands.

In addition, *Sherrill's* holding that the OIN is subject to both the imposition and enforcement of real property taxes is consistent with and follows from this Court's treatment of taxable tribal real property in general. In *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), this Court approved the *in rem* foreclosure of taxable tribal real property. The Court recognized that taxability included "forced sale for taxes" and that the assessment and *in rem* collection of taxes on tribal real estate did not disrupt tribal self-government. *See id.* at 264-65. *Yakima* provides an additional ground for reversal here.

Rather than following the clear dictates of *Sherrill* and *Yakima*, the Second Circuit mistakenly relied on this Court's decisions in *Potawatomi* and *Kiowa*. However, the tribal sovereign immunity holdings of those cases, which involved the assertion of *in personam* jurisdiction over the tribes themselves, have no application here in view of *Sherrill* and *Yakima*. Moreover, sound considerations of policy counsel against the court's invocation of tribal sovereign immunity as a bar to foreclosure. As the Second Circuit recognized, its holding would be equally applicable to "land that was never part of a reservation," Pet. App. 32a (Judges

Cabranes and Hall concurring). There is no conceivable justification for granting Indian tribes immunity from foreclosure and other *in rem* tax enforcement proceedings regarding taxable land to which the tribe has no connection beyond current fee title. This Court's precedents reject this unwarranted expansion of tribal power at the expense of the States' "residuary and inviolable sovereignty" under the Constitution. *Alden v. Maine*, 527 U.S. 706, 715 (1999) (*quoting* The Federalist No. 39, 245 (C. Rossiter ed. 1961)(J. Madison)).[1]

1. Amicus curiae State of New York agrees with petitioners and with amicus curiae Town of Lenox, New York, that the OIN's purported waiver, following the grant of certiorari, of sovereign immunity from enforcement of real property taxation through foreclosure does not moot the issue of sovereign immunity (the first question presented) and that the Court should decide that question. See Brief of Amicus Curiae Town of Lenox, New York, No. 10-72 ("Lenox Br."), at 19-25. Moreover, however the Court resolves that issue, it should decide the question whether the Oneida reservation has been disestablished or diminished (the second question presented). See Lenox Br. at 25-27. The question is hotly contested, *see County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 269 n. 24 (1985) (Justice Stevens, dissenting) (there is a "serious question" whether the Oneida abandoned their claim when they accepted the 1838 Buffalo Creek Treaty), and it was left open in *Sherrill* (544 U.S. at 215 n.9) despite full briefing and argument on the issue by Amicus Curiae New York. See Brief of Amicus Curiae New York in *Sherrill*, 2004 WL 1835367 (explaining that the reservation was disestablished by the Buffalo Creek Treaty and other events.) The issue affects not only the state taxation question at issue here but also other issues of state and federal law, and continues to warrant this Court's review.

ARGUMENT

I. *Sherrill* Bars the OIN's Claim of Sovereign Immunity.

In *Sherrill*, this Court held that the OIN is precluded by laches and other delay-based doctrines from asserting sovereignty regarding its recently acquired lands. The Court specifically concluded that the OIN had no immunity from the city's tax enforcement proceedings. The OIN had sued, among others, the City of Sherrill in federal court after the city initiated eviction proceedings against the OIN following the OIN's nonpayment of taxes and the city's administrative foreclosure. *See Sherrill*, 544 U.S. at 211; *see also Oneida Indian Nation of N.Y. v. City of Sherrill*, N.Y., 145 F. Supp. 2d 226, 236-40 (N.D.N.Y. 2001) (in *Sherrill*, the OIN sought to bar local governments from foreclosing or otherwise enforcing their real property taxes), *aff'd*, 337 F.3d 139 (2d Cir. 2003), *rev'd and remanded*, 544 U.S. 197 (2005). The OIN sought "declaratory and injunctive relief recognizing its present and future *sovereign immunity from local taxation* on parcels of land the [OIN] purchased in the open market." *Sherrill*, 544 U.S. at 214 (emphasis added).

...

This Court rejected the OIN's assertion of sovereign immunity from local taxation, holding that the OIN "cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue." *Id.* at 203; *see also id.* at 222 (Justice Souter concurring) (the OIN "is not now immune from the taxing authority of local government"). In particular, the Court held that the OIN could not invoke immunity to defend against the city's

real property tax enforcement proceedings. In his dissent, Justice Stevens suggested that tribal immunity could be raised "as a *defense* against a state collection proceeding" and observed that *Sherrill* itself presented that very issue. *Id.* at 225. However, the Court's majority squarely rejected that argument:

> The dissent suggests that, compatibly with today's decision, the Tribe may assert tax immunity defensively in the eviction proceeding initiated by *Sherrill*. *Post*, at 225. *We disagree. The equitable cast of the relief sought remains the same whether asserted affirmatively or defensively.*

Id. at 214 n.7 (emphasis added); *see also id.* at 222 (Justice Souter concurring) (rejecting claim of tribal sovereignty, "whether affirmative or defensive"). Accordingly, in *Sherrill* this Court rejected the very claim of immunity from tax enforcement mistakenly upheld below.

The Second Circuit did not even attempt to explain away this Court's rejection of the OIN's defensive use of immunity. Instead, that court found that *Sherrill* did not apply to the OIN's claim of sovereign immunity, based in part on the court's mistaken distinction between tribal sovereign authority over land and tribal sovereign immunity. The court found that the OIN had sovereign immunity from tax enforcement although it acknowledged that the OIN was barred from exercising sovereignty over the land. Pet. App. 11a-20a. But this Court drew no such distinction in *Sherrill*, repeatedly using the words "sovereign" and "sovereignty" in

holding that the OIN's claim of "sovereign immunity from local taxation" was barred. 544 U.S. at 214; *see also id.* at 202, 203, 213, 214, 215 n.9, 216, 219, 220, 221 n.14. As the term implies, "sovereign immunity" is an attribute of sovereignty generally. *See Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 24-25, 30-31 (1st Cir. 2006) (en banc) ("tribal sovereign immunity is most accurately considered an incidence or subset of tribal sovereignty" and "[t]he Tribe has not explained how being subject to the *enforcement* of the State's cigarette tax scheme is an infringement on its retained sovereignty when being subject to the *requirements* of the scheme is not"). Indeed, this Court's decision in *Potawatomi* recognized that tribal sovereign immunity is part of the tribes' "inherent sovereign authority over their members and territories." *Potawatomi*, 498 U.S. at 509 (suits against Indian tribes "are *thus* barred by sovereign immunity") (emphasis added).

Similarly, the OIN argued in opposition to the petition for certiorari, Br. in Opp., No. 10-72, at 22-23, that *Sherrill's* holding that the OIN could not assert "tax immunity" defensively in the city's eviction proceeding does not bar its assertion of sovereign immunity from suit as a defense to these foreclosures. This argument is not persuasive. The eviction case squarely presented the very issue presented here — whether a local government may enforce its real property tax against the OIN. *See Sherrill*, 544 U.S. at 225 (Justice Stevens dissenting). Because the enforcement issue was before the Court, its decision cannot reasonably be interpreted to have left open the possibility that, although the OIN is precluded from

asserting "tax immunity" as a defense to the eviction proceeding, the proceeding is nevertheless absolutely barred by the OIN's sovereign immunity from suit whether or not the property is taxable. On the contrary, *Sherrill's* context makes clear that the Court was permitting the city's eviction proceeding to go forward over the OIN's sovereignty-based objections. Thus, the sovereignty that *Sherrill* bars the OIN from exercising regarding these lands necessarily includes the assertion of sovereign immunity from foreclosure and other enforcement proceedings.

Finally, the Second Circuit's cramped reading of *Sherrill* is at war with the very practical concerns cited by this Court in support of its holding that laches, acquiescence and impossibility "render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate." *Sherrill*, 544 U.S. at 221. Indeed, the Second Circuit's decision treats *Sherrill* as a mere theoretical exercise that is devoid of any practical significance. *Sherrill* made clear that the disruption of the long established local governance that would result if the OIN were held to be immune from the counties' tax and regulatory jurisdiction justified the Court's invocation of laches, acquiescence and impossibility. That reasoning is equally applicable to the OIN's assertion of sovereign immunity.

If the State and the local governments are unable to enforce their tax and regulatory jurisdiction against the OIN, then as a practical matter the OIN cannot be compelled to pay the real property taxes that this Court held it owes or to comply with state and local land

regulations.[2] Depriving the counties of their enforcement authority will inevitably result in the "disruptive practical consequences," including jurisdictional "checkerboard[ing]," that led this Court to reject the OIN's unilateral revival of sovereignty in the first place. *Sherrill*, 544 U.S. at 219; *see id.* at 220 and n. 13 (observing that the OIN's claim would also immunize it "from local zoning or other regulatory controls that protect all landowners in the area"); *see also New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 298 (E.D.N.Y. 2007) (finding of immunity from enforcement would "completely undermine" *Sherrill*'s holding because the state and local governments could not use the courts to avoid the disruptive impact that the Court "clearly stated they have the equitable right to prevent") (appeal pending); *Oneida Tribe of Indians of Wis. v. Village of Hobart, Wis.*, 542 F. Supp. 2d 908, 921 (E.D. Wis. 2008) (*Sherrill* permits forced sale of land for nonpayment of taxes). Therefore, contrary to the holding of the Second Circuit, the same equitable principles of laches, acquiescence and impossibility that barred the OIN's claim of sovereignty in *Sherrill* bar the OIN's similarly disruptive assertion of sovereign immunity here.

2. The harm to state and local governance is not mitigated by the land-to-trust process. Although the U.S. Department of the Interior decided to take into trust for the OIN approximately 13,000 of the 17,000 acres of land at issue here, the Second Circuit's decision will preclude state and local tax and regulatory enforcement over the 4,000 acres of OIN land that were not taken into trust as well as over future purchases by the OIN and other tribes. In addition, the State and others have challenged the Interior Department's trust determination. *See, e.g., New York v. Salazar*, No. 6:08-cv-644, 2010 WL 2346317 (N.D.N.Y. June 9, 2010).

II. *Yakima* Permits the *In Rem* Tax Foreclosure of Taxable Tribal Real Property.

Sherrill found the bars of laches, etc., sufficient to preclude the OIN's sovereignty claims, including its claim of immunity from the city's eviction proceeding. As explained above, *Sherrill* suffices to defeat the OIN's sovereign immunity claim here. In addition, *Sherrill's* holding that the OIN is subject to both real property taxation and eviction for unpaid taxes is consistent with and follows from this Court's treatment of taxable tribal real property in general. The Court's decision in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), permitted the *in rem* foreclosure of tribal land that was subject to local taxation without regard to tribal sovereign immunity. *Yakima* provides an additional ground for reversal here.

The clear import of this Court's decision in *Yakima* is that tribal sovereign immunity does not bar the foreclosure of taxable tribal real property. In *Yakima*, the Court held that section 5 of the General Allotment Act permitted the county to impose an ad valorem tax on reservation land patented in fee pursuant to the Act. *See Yakima*, 502 U.S. at 270. The Court reasoned that, when section 5 rendered the allotted lands alienable and encumberable, "it also rendered them subject to assessment *and forced sale for taxes*." *Id.* at 263-64 (emphasis added). In so holding, the Court did not distinguish between "fee patented lands held by the Tribe or its members," although the county sought to foreclose on reservation parcels "in which the Tribe or its members had an interest." *Id.* at 256. The Court noted that "[l]iability for the ad valorem tax flows

exclusively from ownership of realty on the annual date of assessment" and "creates a burden on the property alone." *Id.* at 266. The Court also observed that unlike *in personam* jurisdiction, the "mere power to assess and collect a tax on certain real estate" is not significantly disruptive of tribal self-government. *Id.* at 265; *see also Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007) ("[a]s a threshold matter, property ownership is not an inherently sovereign function").

This Court's reasoning in *Yakima* is equally applicable here. The Court treated taxability and tax enforcement as two sides of the same coin—the alienability of the lands made them subject to *both* "assessment" and "forced sale for taxes." *Yakima*, at 263-64. In *Sherrill*, this Court determined that the OIN's parcels were subject to local real property taxation. Under New York law, the unpaid property taxes are liens upon the OIN's parcels, and the proceedings to foreclose the tax liens are proceedings *in rem*. *See* N.Y. Real Prop. Tax Law §§ 902, 1120 (McKinney 2000).[3] Consequently, the OIN's parcels are subject to the same *in rem* remedies, including foreclosure, as were the taxable tribal parcels in *Yakima*.

The OIN argued in opposition to the petition for certiorari, *see* Br. in Opp. at 24-25 and n. 13, that *Yakima* has no relevance here because that case did not involve

3. Oneida County follows an *in rem* process, which is described in the district court's decision below. *See* Pet. App. 37a-39a; *see also* Brief for Petitioners, No. 10-72 at 10, n.5, and 20-21, n. 8.

the forced sale of tribally-owned parcels, but that is not the way the Yakima Tribe presented its case to this Court. In its brief, the tribe said it brought the action "to invalidate the County's imposition and collection of real estate taxes on fee lands of the Tribe and of tribal members." *See* Resp. Br., 1991 WL 521292 at *9; *see also* Jt. App., Nos. 90-408, 90-577, at 5 (Complaint ¶ XI ["The defendants have scheduled a public tax sale of approximately 40 parcels of real estate located within the Yakima Indian Reservation in which the Yakima Nation and/or its members have a fee patent interest"]); Pet. Br., 1991 WL 521727, at *5 (county commenced foreclosure proceeding in state court against "several properties owned in fee by the Yakima Tribe or individual Yakima members").

In addition, the Yakima Tribe specifically argued that it retained its "sovereign immunity from suit" and, citing this Court's then-recent decision in *Potawatomi*, asserted that "[a] confrontation over non-payment of property taxes would have left the State in the embarrassing position of being unable to judicially enforce property taxes which may have been assessed." Resp. Br., 1991 WL 521292 at *35. The Tribe would not have made this argument, which the OIN also makes here, unless its own properties were at stake. But this Court held that the taxable tribal land was subject to "forced sale for taxes." *Yakima*, 502 U.S. at 264. Thus, under *Yakima*, tribal sovereign immunity does not preclude the *in rem* real property tax foreclosure proceedings here.

III. *Potawatomi* and *Kiowa* Do Not Support Tribal Sovereign Immunity From These Foreclosure Proceedings.

Misconstruing *Sherrill* and disregarding *Yakima*, the Second Circuit mistakenly concluded that this Court's decisions in *Potawatomi* and *Kiowa* compelled the conclusion that the OIN was immune from the counties' foreclosures. Pet. App. 14a-23a. First, as explained in Point I, *Sherrill* bars the OIN from asserting *any* sovereignty-based claims it might otherwise have, including tribal sovereign immunity from suit, in connection with the State and local governments' enforcement of their tax and regulatory jurisdiction over the OIN's recently acquired lands.

Second, as explained in Point II, *Yakima* permits *in rem* real property tax foreclosure proceedings against taxable tribal lands. Thus, the OIN has no sovereign immunity from the counties' *in rem* real property tax foreclosures. In contrast, *Potawatomi* and *Kiowa* involved *in personam* actions against the tribes and arose in circumstances very different from this case. In addition, this Court decided *Potawatomi* shortly before *Yakima* was briefed and argued, and the Yakima Tribe cited the decision to no effect in support of its claim to "sovereign immunity from suit." Resp. Br., 1991 WL 521292, at *35. And although *Kiowa* held that Indian tribes enjoyed sovereign immunity even from suits based on contracts entered into outside the reservation, 523 U.S. at 760, that conclusion did not abrogate *Yakima*'s earlier holding that taxable land owned by an Indian tribe within reservation boundaries was subject to forced sale for taxes. *Yakima*, rather than *Potawatomi*

and *Kiowa*, governs *in rem* tax foreclosure of taxable tribal real property.

Third, sound policy reasons counsel against extending *Potawatomi* and *Kiowa* to the foreclosure context. In *Potawatomi*, this Court held that Oklahoma could not sue the tribe for payment of the cigarette taxes that the tribe was required to collect on its reservation sales to non-tribal members. The Court relied on the availability of other enforcement options regarding cigarette taxes. *See Potawatomi*, 498 U.S. at 514 (noting that the State, although barred from suing the tribe to collect its cigarette taxes, could in the alternative sue tribal officers, enforce against wholesalers, enter agreements with the tribes or seek relief from Congress). The Second Circuit stated that similarly, an alternative remedy was available here, because tribal officers "remain susceptible to suits for damages and injunctive relief." Pet. App. 23a.

The Second Circuit's reliance on *Potawatomi*'s list of alternative cigarette tax enforcement strategies does not support a finding of immunity here because there is no meaningful real property tax enforcement alternative to a foreclosure action. The action to foreclose a lien for unpaid real property taxes provides a high probability of prompt payment, and thus foreclosure is a venerable and universal tax collection mechanism. *See L.K. Land Corp. v. Gordon*, 136 N.E.2d 500, 501 (N.Y. 1956) (tax lien foreclosure action is "the primary means of enforcing a claim," as opposed to "other remedies, uncertain and less efficacious"). In contrast, the Second Circuit's suggested alternative involves uncertainty and delay. *See* Brief for Petitioners, No. 10-72, at 24, n. 11.

And although *Kiowa* acknowledged that tribal sovereign immunity may bar suits by involuntary claimants such as tort victims, 523 U.S. at 758, *Kiowa* itself involved a private lender's action against the tribe on a promissory note — a garden-variety voluntary commercial loan transaction. But the counties here did not choose to enter their relationship with the OIN, and unlike a private tort victim, the counties are the local governments that this Court held to be sovereign over these lands. Accordingly, *Kiowa* cannot reasonably be extended to bar these *in rem* foreclosure proceedings.

Finally, as a majority of the Second Circuit panel recognized, its application of *Potawatomi* and *Kiowa* here extends tribal sovereign immunity to bar tax foreclosure even as to "land that was never part of a reservation." Pet. App. 32a (Judges Cabranes and Hall concurring). Under the court's analysis, the OIN, or any other Indian tribe, could buy real property anywhere in the United States, *e.g.*, the Empire State Building, refuse to pay real property taxes, and invoke sovereign immunity from suit as an absolute defense to the resulting foreclosure action. The Second Circuit's holding does not depend on the tribal history or legal status of the land but follows solely from the fact of tribal fee ownership today. There is no conceivable policy justification for a decision that could disrupt state and local governance in every community in the United States. The Court should reject the Second Circuit's dramatic expansion of tribal power at the expense of all the States and their local subdivisions and hold instead that *Sherrill* and *Yakima*, not *Kiowa* and *Potawatomi*, govern this case.

CONCLUSION

For the foregoing reasons, the amici curiae States respectfully urge this Court to reverse the judgment of the United States Court of Appeals for the Second Circuit.

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AMICUS CURIAE BRIEF

No. 10-72

In the Supreme Court of the United States

MADISON COUNTY, NEW YORK, ET AL.,
PETITIONERS,

V.

ONEIDA INDIAN NATION OF NEW YORK,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* TOWN OF LENOX, NEW YORK, IN SUPPORT OF PETITIONERS MADISON COUNTY AND ONEIDA COUNTY, NEW YORK

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INTEREST OF *AMICUS CURIAE*[1]

The Town of Lenox is located in Madison County and lies within the footprint of the Oneidas' 18th-century reservation.[2] As in other neighboring communities, the Oneida Indian Nation of New York ["OIN"] has purchased a checkerboard of commercially desirable lands within Lenox, refused to pay taxes on these lands, and refused to comply with numerous zoning, land-use, health and safety, and other "local regulatory controls." *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 220 n.13 (2005). None of these tribally purchased lands in Lenox is included within the acreage that the U.S. Department of the Interior is seeking to place into federal trust pursuant to 25 U.S.C. § 465, and thus none will be exempt from state and local taxation if Interior's decision is upheld.

This Court's landmark decision in *Sherrill*—in which Lenox participated as an *amicus*[3]—was supposed to have resolved the sovereignty dispute that is now back before the Court. *Sherrill* rejected OIN's theory that "sovereign dominion" had somehow been "unified" with title when the tribe reacquired these parcels. *Id.* at 213-14; *see id.* at 221 (rejecting "the piecemeal shift in governance this suit seeks unilaterally to initiate"). OIN cannot "unilaterally revive its ancient sovereignty, in whole or in part," over aboriginal tribal lands that it reacquires "through open-market purchases from current titleholders." *Id.* at 203, 220-21

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[1] This brief is presented pursuant to Sup. Ct. R. 37.4. The Town's authorized law officer appears as co-counsel.

[2] Lenox was founded in 1809, occupies 36.4 square miles, and had a population of 8,665 as of the 2000 census.

[3] *See* Brief of Amici Curiae Town of Lenox et al. in Support of Petitioner City of Sherrill, *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) (No. 03-855), 2004 WL 1835370.

(citations omitted). "Sovereign dominion" and "authority" therefore remain vested with New York and its county and local governments. *Id.* at 213, 221.

For well over five years, however, OIN has refused to comply with *Sherrill*'s mandate. It continues to flout the property tax obligations that *Sherrill* upheld, thereby continuing to deny critically needed revenues to local governments and school districts. Just as seriously, OIN also continues to refuse to submit to a variety of local zoning, land-use, health and safety, and other "local regulatory controls" in Lenox and elsewhere that, under *Sherrill*, govern OIN's newly purchased non-trust lands. *Id.* at 220 n.13. Many of these parcels are surrounded by non-Indian properties and occupy strategic locations throughout the original reservation area. OIN has cherry picked these lands—including gas stations, convenience stores, shopping centers, marinas, prime highway billboard locations, manufacturing facilities, and other key commercial properties—and then unilaterally declared them off-limits to state and local taxation, zoning and land-use controls, and other *in rem* regulatory authority. Thus the *very* chaos and uncertainty, "disruptive practical consequences," and "serious burdens" on local governments that this Court's decision in *Sherrill* was intended to avoid have only grown worse in recent years. *Id.* at 219-20.

SUMMARY OF THE ARGUMENT

The Counties' opening brief ably demonstrates the many ways in which the decision below is in irreconcilable conflict with *Sherrill* and the bedrock distinction between *in personam* and *in rem* jurisdiction drawn in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 263-65 (1992). This brief focuses on how the decision below *also* is in fundamental conflict with this Court's tribal sovereign immunity jurisprudence, with this Court's treatment of foreign and state sovereigns in

analogous circumstances, and with this Court's decisions authorizing States to take *in rem* enforcement action against other types of tribal property outside tribal jurisdiction.

This Court developed the doctrine of tribal sovereign immunity in order to extend to Native American tribes "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). But tribes do not retain the full sovereignty of foreign nations or the fifty States. Instead, they are "domestic dependent nations" that are "completely under the sovereignty and dominion of the United States." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *see also United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character."). The "limited character" of tribal sovereignty necessarily restricts the scope of tribal sovereign *immunity* as well. *See Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986) ("Of course, because of the peculiar 'quasi-sovereign' status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy.").

Yet the decision below allows OIN to do what no foreign nation or domestic State could get away with: purchase lands outside its "sovereign dominion"; put those lands to a variety of commercial uses; refuse to comply with valid tax, zoning, land-use, and other "local regulatory controls" governing those lands; then avoid any *in rem* enforcement measures by invoking its "sovereign immunity" from suit. As demonstrated in Part I, traditional principles of both foreign and state sovereign immunity have long recognized an "immovable property" exception for lands purchased *outside* a sovereign's jurisdiction and "dominion." This Court repeatedly has emphasized that tribes do not have "supersovereign authority to interfere with another jurisdiction's sovereign right[s] . . . within that jurisdiction's

limits." *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995); *see also Rice v. Rehner*, 463 U.S. 713, 734 (1983) (tribal members are not "super citizens"). The decision below flouts these principles by recognizing a tribal "supersovereign" immunity not enjoyed by any foreign or state sovereign.

Neither *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), nor *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), supports the decision below. Neither involved an *in rem* action against immovable property located *outside* the tribe's "sovereign dominion"; neither implicated *another* sovereign's jurisdiction and *in rem* enforcement authority over lands within *its* "sovereign dominion"; both left the non-tribal parties with meaningful alternative remedies.

As demonstrated in Part II, OIN has failed to moot the first Question Presented through its November 29, 2010 "declaration and ordinance" purporting to waive its "sovereign immunity to enforcement of real property taxation through foreclosure." The waiver's scope is far too narrow, and its consequences far too uncertain, to moot the immunity issue either in the context of the specific foreclosure actions here or in the variety of other contexts in which OIN and other tribes continue to claim sovereign immunity from *in rem* actions to enforce zoning, land-use, health and safety, and other "local regulatory controls" over tribally purchased non-trust lands. *Sherrill*, 544 U.S. at 220 n.13. Because it is far from "*absolutely clear*" that the Counties "no longer ha[ve] any need of the judicial protection that [they have] sought," the issue of tribal sovereign immunity from *in rem* enforcement is not moot. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (per curiam) (emphasis added).

As demonstrated in Part III, this Court also should reach the second Question Presented and hold that the boundaries of the Oneidas' original 18th-century reservation have either been disestablished or diminished.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S TREATMENT OF FOREIGN AND STATE SOVEREIGN IMMUNITY, AND IMPERMISSIBLY GIVES "SUPERSOVEREIGN AUTHORITY" TO TRIBES.

A. The Decision Below Conflicts With Principles of Foreign Sovereign Immunity.

Under "primeval" principles, the People's Republic of China could not purchase property in Madison County, put it to commercial use, refuse to pay its property taxes or comply with zoning and other "local regulatory controls," and then defeat the County's *in rem* enforcement actions against the property by invoking sovereign immunity. *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (CADC 1984). That should be the end of the analysis here. This Court repeatedly has looked to the limits on *foreign* sovereign immunity as "instructive" in defining the limits on *tribal* sovereign immunity. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 421 n.3 (2001); *Kiowa*, 523 U.S. at 759; *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560-61 (1832) (defining tribal sovereignty in reference to the "settled doctrine of the law of nations"). Indeed, the immunity of a *foreign* nation necessarily marks the outer boundary of any legitimate claim of immunity by a *domestic dependent* nation; far from being "supersovereign[s]" with *greater* immunity than foreign nations, tribes enjoy less sovereignty and fewer immunities given their "dependent" status. *Chickasaw Nation*, 515 U.S. at 466.

The federal common law of *foreign* sovereign immunity, which "long predated" the enactment of the Foreign Sovereign Immunities Act of 1976 ["FSIA"], 28 U.S.C. § 1602 *et seq.*, is that, as a general matter, "when owning property here, a foreign state must follow the same rules as everyone else." *City of New York v. Permanent Mission of India to the U.N.*, 446 F.3d 365, 374 (CA2 2006), *aff'd*, 551 U.S. 193 (2007). This Court first embraced that rule nearly two centuries ago, observing that "[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction [of the foreign country], he may be considered as so far laying down the prince, and assuming the character of a private individual." *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 145 (1812). The reason for exempting "immovable property" within U.S. jurisdiction from the scope of foreign sovereign immunity is "self evident":

> "A territorial sovereign has a primeval interest in resolving all disputes over use or right to use of real property within its own domain. As romantically expressed in an early treatise: 'A sovereignty cannot safely permit the title to its land to be determined by a foreign power. Each state has its fundamental policy as to the tenure of land; a policy wrought up in its history, familiar to its population, incorporated with its institutions, suitable to its soil.'" *Reclamantes*, 735 F.2d at 1521 (quoting 1 F. Wharton, *Conflict of Laws* § 278, at 636 (3d ed. 1905)).

These identical considerations drove this Court's sovereignty determination in *Sherrill*. *See* 544 U.S. at 202, 211, 215-16, 219-20 ("character of the area," history of "regulatory authority" and "jurisdiction," current demographics, "justifiable expectations" of current residents, and potentially

"disruptive practical consequences" of accentuating "checkerboard" allocation of sovereignty).[4]

"Under international law, a [foreign] state is not immune from the jurisdiction of the courts of another state with respect to claims . . . to immovable property in the state of the forum." *Restatement (Third) of Foreign Relations Law* § 455(1)(c) (1987). This lack of immunity extends to the *enforcement*, not simply the rendition, of judgments. "Immovable property" owned by foreign states is "subject to execution" if "the judgment relates to that property" and the property is "used for commercial activity" rather than "a diplomatic or consular mission or for the residence of the chief of such mission." *Id.* § 460(2)(e). *See also Restatement (Second) of Foreign Relations Law* § 68(b) (1965) ("The immunity of a foreign state . . . does not extend to . . . an action to obtain possession of or establish a property interest in immovable property located in the territory of the State exercising jurisdiction."),[5] United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. Doc.

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[4] *See also* Charles Fairman, *Some Disputed Applications of the Principle of State Immunity*, 22 Am. J. Int'l L. 566, 567 (1928) ("The writers of authority are of [the] opinion that rights to real property are a matter so intimately connected with the very independence of the state that none other than the local courts could be permitted to pass upon them."); *Draft Convention of the Competence of Courts in Regard to Foreign States*, 26 Am. J. Int'l L. Supp. 451, 578 (1932) ("[L]and is so indissolubly connected with the territory of a State that the State of the situs cannot permit the exercise of any other jurisdiction in respect thereof, saving always the special consideration necessitated by diplomatic intercourse.") ["*Draft Convention*"].

[5] The *Restatement (Second)* offers this example: "State A brings proceedings in eminent domain in its courts to condemn real property owned by state B in A. B is not entitled to immunity from such a suit." Section 68(b) cmt. d, illus. 6.

A/RES/59/38, Art. 13(a) (foreign State not entitled to immunity "in a proceeding which relates to the determination of . . . any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum"); Letter from Jack B. Tate of May 19, 1952, 26 Dep't of State Bull. 984 (1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976) (despite conflicts between the "classical or absolute theory" and the "newer or restrictive theory," "[t]here is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property exempted)").

Congress codified the "immovable property" exception in the FSIA. That Act provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which . . . rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). Moreover, any such property "used for a commercial activity" is subject to execution if "the execution relates to a judgment establishing rights in [the] property" and the property "is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission[.]" *Id.* § 1610(a)(4)(B). These provisions were intended to *codify*, not alter, "the pre-existing real property exception to sovereign immunity recognized by international practice." *Reclamantes*, 735 F.2d at 1521; *see also Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. 193, 199-201 (2007); H.R. Rep. No. 94-1487, at 20 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618-19.

OIN claims these FSIA provisions *departed* from the traditional "background rule" that supposedly recognized "sovereign immunity against foreclosure" of tax-delinquent

real property held by a foreign government for *any* purpose, even commercial and investment activities. Opp. at 16, 19, 21. But OIN has failed to cite a single case in which such a sweeping "background rule" was ever recognized or applied. To the contrary, many of the cases cited in its Brief in Opposition involved maritime vessels, bank accounts, and other forms of *personal* property, *see id.* at 16-18 & n.9—not *real* property, which always has been subject to different rules given its "primeval" importance. *See supra* pp.6-8; *see also Draft Convention*, *supra* n.4, at 590 ("[S]pecial considerations are generally deemed applicable to immovable property, which do not extend to movable property.")

Those cases cited by OIN that did pertain to real property all involved the special prohibition against executing against *diplomatic and consular property*.[6] These situations are governed by special rules that do not apply to foreign-owned real property used for commercial and other non-governmental purposes. The diplomatic real property immunity from execution is the *exception* to the rule, not the rule itself. *See, e.g.*, Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Y.B. Int'l L. 220, 244 n.3 (1951) ("The complete subjection of immovable property to the jurisdiction of the state has been regarded subject to one limitation, namely, when the action concerns immovable property actually used for the purposes of the diplomatic mission."); *Draft Convention*, Art. 23(a),

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[6] Those off-point cases (*see* Opp. at 16-17 & n.8) include *Permanent Mission*, 551 U.S. at 195-96 & n.1; *City of Englewood v. Socialist People's Libyan Arab Jamahuriya*, 773 F.2d 31, 32, 36 (CA3 1985); *In re Foreclosure of Tax Liens*, 255 N.Y.S.2d 178, 179 (Westchester Cty. Ct. 1964); and *Knocklong Corp. v. Kingdom of Afghanistan*, 167 N.Y.S.2d 285, 286 (Nassau Cty. Ct. 1957), all involving real property used for diplomatic offices and residences.

supra n 4, at 706 ("A State may permit orders or judgments of its courts to be enforced against the property of another State not used for diplomatic or consular purposes . . . [w]hen the property is immovable property[.]").

Although OIN is unable to cite any authority in support of its supposed "background rule" prohibiting *any* execution against *any* real property owned by foreign states, it claims there are no decisions going the other way. Opp. at 17. But as Professor Fairman observed long ago, the relative dearth of cases "where a state has presumed to claim immunity from judicial process in actions incident to real estate owned abroad . . . probably means that there is a realization that no such pretension would be admitted." Fairman, *supra* n 4, at 567 (discussing cases allowing "execution of the judgment" against foreign-owned real property). Moreover, the strong weight of judicial, diplomatic, and academic authority is against a general immunity from execution. As one commentary noted long before FSIA's enactment, "though definitive decisions are few, it may be taken as established that orders of a court are enforceable against immovable property of a foreign state in suits concerning this property." Note, *Execution of Judgments Against the Property of Foreign States*, 44 Harv. L. Rev. 963, 965 (1931) (collecting authorities). A sovereign's "primeval" interests in controlling real property within its jurisdiction require not only the authority to *render* judgments affecting that property, but to *enforce* and *execute upon* those judgments as well. "[T]he reasons . . . for permitting the institution of a proceeding against a State in

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[7] *See generally* William W. Bishop, Jr., *Immunity from Taxation of Foreign State-Owned Property*, 46 Am. J. Int'l L. 239, 247-56 (1952); *Restatement (Second)* § 68 cmt. f ("Diplomatic immunity distinguished."); *Draft Convention*, *supra* n 4, at 578 (discussing "well-established immunities protecting immovable property used for diplomatic missions").

respect of its immovable property are applicable to explain the justification for permitting enforcement of orders or judgments against such property." *Draft Convention supra* n.4 at 702.[8]

OPN relies heavily on the "General Rule" set forth in *Restatement (Second)* § 65 & cmt d, which "prevents the actual enforcement against the property of a foreign state of a tax claim of the territorial state." *See* Opp. at 16 n.8, 18-19. But that "General Rule" applies to all forms of property and is expressly made subject to the "exception[]" in § 68(b) for "an action to *obtain possession* of ... immovable property" (emphasis added), which clearly *is* subject to *in rem* execution. Moreover, the *Restatement (Third)* unambiguously allows "execution" against real property owned by foreign nations "used for commercial activity" rather than diplomatic purposes. *See supra* p. 7.

B. The Decision Below Conflicts With Principles of State Sovereign Immunity.

This Court long ago held that the "immovable property" exception also limits the scope of a State's sovereign immunity. In *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924), the State of Georgia purchased eleven acres in Chattanooga, Tennessee for use as a railroad yard. Later, Georgia brought an original action claiming the City could

[8] *See also Draft Convention*, *supra* n.4, at 577-90 (collecting authorities); Lauman, *supra* n.4, at 567 & nn.4-6 (collecting authorities recognizing sovereign's right to exercise territorial jurisdiction, including to execute upon judgments, over real property owned by other nations); Lauterpacht, *supra*, at 244 (noting "uniform authority in support" and undoubted acceptance" of the rule that "there is no immunity from jurisdiction with respect to actions relating to immovable property.").

not condemn the property because of Georgia's sovereign immunity. This Court unanimously rejected that claim:

> "The power of Tennessee, or of Chattanooga as its grantee, to take land for a street, is not impaired by the fact that a sister state owns the land . . . . *Land acquired by one state in another state is held subject to the laws of the latter and to all the incidents of private ownership.* . . . The sovereignty of Georgia was not extended into Tennessee . . . [Georgia] cannot claim sovereign privilege or immunity. . . . [Georgia's] property [in Tennessee] is as liable to condemnation as that of others, and it has, and is limited to, the same remedies as are other owners of like property in Tennessee. *The power of the city to condemn does not depend upon the consent or suability of the owner.*" *Id.* at 479-82 (emphasis added, citations and paragraph breaks omitted)

The rule of *Georgia v. Chattanooga* has been invoked in many *in rem* enforcement contexts. It is "elementary" that "a state acquiring ownership of property in another state does not thereby project its sovereignty into the state where the property is situated. The public and sovereign character of the state owning property in another state ceases at the state line[.]" *State v. City of Hudson*, 231 Minn. 127, 130, 42 N.W.2d 546, 548 (1950) (*re* proceedings to enforce property taxes on portion of bridge owned by Wisconsin city but located in Minnesota). "If it were otherwise, the acquisition of land in [one State] by another State would effect a separate island of sovereignty within [the home State's] boundaries. Such possibility can find no support in the law or reason." *People ex rel. Hoagland v. Streeper*, 12 Ill. 2d 204, 213, 145 N.E.2d 625, 630 (1957) (*re*

court-imposed receivership over portion of bridge owned by Missouri county but located in Illinois).[9]

Likewise, because States are not allowed to create "separate island[s] of sovereignty" by purchasing land within another sovereign's jurisdiction, *id.*, neither may tribes. *See especially Cass Cnty. Joint Water Res. Dist. v. 1.43 Acres of Land*, 2002 ND 83, ¶¶ 4, 12, 21, 643 N.W.2d 685, 688, 691, 694 (2002) (relying on *Georgia v. Chattanooga* in holding that tribal sovereign immunity does not bar a "purely in rem action against land held by the Tribe in fee" that is "not held in trust by, or otherwise under the superintendence of, the federal government"; such land "is essentially private land," "the State may exercise territorial jurisdiction" over it, "and the Tribe's sovereign immunity is not implicated").[10]

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[9] *See also City of Augusta v. Timmerman*, 233 F. 216, 217, 219 (CA4 1916) (re forced tax sale of South Carolina land owned by Georgia; recognizing Georgia's immunity claim would be "anomalous and contrary to legislative history and governmental policy"); *State ex rel. Taggart v. Holcomb*, 85 Kan. 178, 184-85, 116 P. 251, 253 (1911) (Missouri city's waterworks plant in Kansas "has no other or greater rights than a private corporation engaged in the same business. It is part of a sovereignty, it is true, but its powers cannot be exercised in Kansas . . . [A] state of the Union is only sovereign in its own territory."); *City of Cincinnati v. Commonwealth ex rel. Reeves*, 292 Ky. 597, 167 S.W.2d 709, 714 (Ct. App. 1942) ("A municipality operating beyond the boundaries of the sovereignty creating it, is universally regarded as a private corporation with respect to such operations.").

[10] At issue in *Cass County* was a parcel of land that would be flooded by a proposed dam. A project opponent sold the parcel to the Turtle Mountain Band of Chippewa Indians; the land allegedly had been aboriginally occupied by the Band's ancestors and "contain[ed] a culturally significant village site and burial site." 2002 ND 83, ¶¶ 2-4, 643 N.W.2d at 688. The Band claimed that its newly acquired parcel could not be condemned because, among other reasons, of its "tribal sovereign immunity" under *Kiowa*

OIN seeks to distinguish *Georgia v. Chattanooga* on the supposedly "decisive[]" ground that a State's immunity in another State's courts is a matter of interstate comity rather than Eleventh Amendment command. Opp. at 20 (citing *Nevada v. Hall*, 440 U.S. 410, 426 n.29 (1979)). But this Court framed its decision in *Georgia v. Chattanooga* as an exception to the usual rules of "sovereign privilege or immunity" from suit. 264 U.S. at 480-81. That those rules result from "comity" is immaterial. "*[F]oreign* sovereign immunity is a matter of grace and comity," yet those comity-based rules are clearly "instructive" in defining the scope of tribal sovereign immunity. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) (emphasis added); *see supra* p.5. Moreover, as *Sherrill* emphasized, rules of state sovereignty "provide a helpful point of reference" in tribal sovereignty cases even where they "do not dictate a result." 544 U.S. at 218.

OIN offers no explanation *why* it should enjoy "supersovereign" immunity greater than that of a State holding immovable property in another sovereign's jurisdiction. *Chickasaw Nation*, 515 U.S. at 450. Indeed, this Court has emphasized that tribal sovereign immunity "[o]f course" is *narrower* than, "not congruent with," state sovereign immunity. *Three Affiliated Tribes*, 476 U.S. at

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See id. ¶ 12, 643 N.W.2d at 690-91. The North Dakota Supreme Court unanimously rejected this claim given the fundamental distinction between *in personam* and *in rem* jurisdiction. *See id.* ¶¶ 13-15, 19-20, 643 N.W.2d at 691-94. Failing to honor this distinction "would have far-reaching effects on the eminent domain authority of states and all other political subdivisions. Indian tribes would effectively acquire veto power over any public works project . . . merely by purchasing a small tract of land within the project," and "all public works projects [would] be subject to uncertainty." *Id.* ¶¶ 24-25, 643 N.W.2d at 694-95.

890-91. The decision below turns this lack of "congruence" on its head.[11]

C. Cases Prohibiting Execution Against a Sovereign's Real Property Within Its Own Jurisdiction Are Inapposite.

OIN cites several other lines of cases in support of its supposed "background rule" that a sovereign may *never* execute against real property within its jurisdiction that is owned by another sovereign. *See* Opp. at 15-16 & n.7. Most involved suits against federal property located in the United States, which obviously is not subject to the "immovable property" exception because it is located *within* rather than *without* the owning sovereign's jurisdiction. And given the federal government's supremacy over all other sovereigns within its borders, it is hardly surprising that state, local, and tribal sovereigns may not foreclose on federally owned property of any kind without the federal government's permission. *See, e.g., United States v. Alabama*, 313 U.S. 274, 281 (1941). Tribes, of course, are lesser, "dependent" sovereigns. *See supra* p.3. That the federal government's immunity prevents suit against its property *within* its "sovereign dominion" says nothing about a tribe's immunity with respect to property it owns *outside* its dominion.

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[11] There is certainly no basis for treating the sovereign authority to enforce tax obligations as any less important than the power of eminent domain. Because "taxes are the lifeblood of government, and their prompt and certain availability an imperious need," sovereigns "[t]ime out of mind" have been permitted to seize and execute upon property for the nonpayment of taxes. *Bull v. United States*, 295 U.S. 247, 259-60 (1935); *see also Shaffer v. Carter*, 252 U.S. 37, 52 (1920) (sovereign power includes not only levying taxes, but "enforcing payment . . . by the exercise of a just control over persons and property within its borders"). OIN's condition-laden "letters of credit" are hardly an adequate substitute for the "lifeblood" of prompt and reliable payment of taxes.

OIN also relies on *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997), which held that the Eleventh Amendment bars a quiet-title action against a State seeking to determine ownership of lakebeds *within* the State's jurisdiction because, under the Equal Footing Doctrine, those beds presumptively are state property under state dominion (and thus subject to state sovereign immunity). *See* Opp. at 15. That again is readily distinguishable from property owned by one government that is located in *another* government's "sovereign dominion." Similarly inapposite is *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 495 (1998) (*see* Opp. at 15), which involved the exercise of federal *in rem* admiralty jurisdiction against a res "not within the State's possession." That decision turned on "the special characteristics of *in rem* admiralty actions," *id.* at 510 (Stevens, J., concurring), which do not apply to *in rem* actions against immovable property held outside the owning sovereign's territorial jurisdiction.

D. The Decision Below Does Not Follow From, But Conflicts With, *Kiowa*, *Potawatomi*, and This Court's Other Tribal Sovereign Immunity Decisions.

This Court's decisions in *Kiowa* and *Potawatomi* merely reaffirmed and applied the Court's prior decisions that had extended the "traditional" federal common law immunity of "*dominum sovereignties*" like foreign nations and States to "*domestic dependent*" tribal sovereigns as well. *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) (emphasis added); *see also Santa Clara*, 436 U.S. at 58; *Turner v. United States*, 248 U.S. 354, 357 (1919) (tribes should be treated "[l]ike other governments"). Nothing in *Kiowa*, *Potawatomi*, or this Court's earlier decisions suggests that the immunity of tribes is even *greater* than that enjoyed by foreign or state sovereigns.

Kiowa and *Potawatomi*, moreover, did not implicate another sovereign's *in rem* jurisdiction over lands within its own "dominion," and left the aggrieved parties with meaningful alternatives. *Kiowa* dealt with tribal immunity from private contract claims—claims that implicate none of the state and local sovereignty concerns presented here, and that are subject to bargaining and adjustment by the contracting parties. *See C & L Enters.*, 532 U.S. at 418-23. And *Potawatomi* merely barred claims for money damages against tribal treasuries, while emphasizing the availability of numerous "adequate alternatives" to such damage claims. 498 U.S. at 514. Although sovereign immunity prevented the State from pursuing "the most efficient remedy," there were a variety of alternative claims and enforcement actions that this Court believed could "produce the revenues to which [the States] are entitled." *Id.* There are no such "adequate alternatives" here.

Indeed, *Potawatomi* instructed that States may take off-reservation *in rem* action against tribally owned property, emphasizing that States may "*of course*" enforce their cigarette tax laws by "seizing unstamped cigarettes off the reservation" that had been purchased by tribally owned retailers and were on their way to reservation outlets. *Id.* (emphasis added). This Court pointed (*id.*) to its earlier decision in *Washington v. Confederated Tribes of the Colville Indian Reservation*, which also upheld seizures of "cigarettes in transit" where the affected tribes "have refused to fulfill collection and remittance obligations which the State has validly imposed." 447 U.S. 134, 161-62 (1980). *Colville* explained that, "[b]y seizing cigarettes en route to the reservation, the State polices against wholesale evasion

of its own valid taxes *without unnecessarily intruding on core tribal interests*." *Id.* at 162 (emphasis added).[12]

Potawatomi and *Colville* thus recognize that state and local governments may take *in rem* action against tribally owned *movable* property that violates applicable substantive laws. *See Keweenaw Bay Indian Cmty. v. Rising*, 477 F.3d 881, 894-95 (CA6 2007) ("[T]he Court was well aware of the issue of tribal sovereign immunity when it approved the seizures in question [in *Potawatomi* and *Colville*]. . . . [T]he Supreme Court has clearly endorsed state seizures as a remedy where sovereign immunity prevents in-court remedies") (citations omitted).[13] If tribally owned *movable* property is not immune from *in rem* enforcement actions outside the tribe's sovereign dominion, surely tribally owned *immovable* property is not immune from such actions. That is particularly true given the unique concerns for sovereignty, jurisdiction, and regulatory authority implicated by one sovereign's ownership of immovable property in another sovereign's dominion. *See supra* Parts I-A and I-B.

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[12] In both *Colville* and *Potawatomi*, the retailers whose cigarettes were seized by the State were tribally owned and thus subject to tribal sovereign immunity. *See Colville*, 447 U.S. at 144-45; *Potawatomi*, 498 U.S. at 507.

[13] *See also Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1236-37 (CA10 2010); *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 21 (CA1 2006) (en banc); *Yakama Indian Nation v. Wash. Dept. of Revenue*, 176 F.3d 1241, 1246 (CA9 1999).

II. OIN'S BELATED "WAIVER" OF ITS NONEXISTENT "SOVEREIGN IMMUNITY" FROM CERTAIN *IN REM* ACTIONS DOES NOT MOOT THE IMMUNITY ISSUE.

On November 30, 2010, OIN announced that it had adopted, the day before, a "tribal declaration and ordinance" purporting to "waive" its "sovereign immunity" in the specific context of "enforcement of real property taxation through foreclosure." This apparently tactical announcement, however, does not moot the recurring question whether OIN is immune from state and local *in rem* jurisdiction to enforce the substantive laws that, under *Sherrill*, govern the lands in issue here. If anything, OIN's unilateral action (announced 72 hours before the Counties' opening brief was due, after ten years of litigation and two trips to this Court) simply underscores the need for a definitive pronouncement by this Court that tribal sovereign immunity does not extend to *in rem* enforcement actions against non-trust lands purchased by a tribe on the open market.

A party seeking to moot an issue in litigation through its own "voluntary conduct" bears a "'heavy,'" "stringent," and "formidable burden of showing that it is *absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur*." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189-90 (2000) (emphasis added, citations omitted). It must also prove that "interim relief or events have *completely and irrevocably eradicated the effects* of the alleged violation"—the tribe's "violation" here being the invocation of a nonexistent immunity from *in rem* enforcement proceedings. *City of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (emphasis added, citations omitted). These "stringent" burdens must be at their zenith where, as here, the issue the party is now attempting to moot has been litigated for a full decade, the case already has come before this Court once before, and the

Court has granted *certiorari* a second time. To allow a litigant to engineer a mootness-based dismissal at such a late date "would be justified only if it were *absolutely clear that the [opposing] litigant no longer had any need of the judicial protection that it sought*." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (per curiam) (emphasis added); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000) (emphasizing "[o]ur interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review" through unilateral action allegedly mooting the controversy); *Laidlaw*, 528 U.S. at 191-92 ("To abandon the case at an advanced stage may prove more wasteful than frugal."); *Honig v. Doe*, 484 U.S. 305, 332 (1988) (Rehnquist, C.J., concurring) (discussing special concerns "where the events which render the case moot have supervened since our grant of *certiorari*").

Disputes over the validity, scope, and consequences of tribal sovereign immunity waivers have long been a "vexing" and "fertile source of litigation." Conference of Western Attorneys General, *American Indian Law Deskbook* 302 (4th ed. 2008) ["*Deskbook*"]. Such waivers are "strictly construed" in *favor* of the waiving sovereign and *against* waiver, and in accordance with the "intent" of the waiving sovereign. *Lane v. Pena*, 518 U.S. 187, 192 (1996). Tribal immunity waivers have often been struck down for failure to comply with the waiving tribe's organic laws, and under tribal exhaustion principles some courts have held that disputes concerning the validity and scope of tribal waivers must be submitted to *tribal* courts for resolution under *tribal* laws.[14] Moreover, an immunity waiver must address "'not

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[14] *See, e.g., Swanda Bros., Inc. v. Chasco Constructors, Ltd.*, No. CIV-08-199-D, 2010 WL 1372523, at *5 (W.D. Okla. Mar. 30, 2010) (dismissing dispute over tribal entity's waiver so that "the appropriate tribal court" could determine the validity and

merely *whether* [the sovereign] may be sued, but *where* it may be sued,'" and a waiver that is silent or ambiguous on the latter issue will be construed to "constitute[] a waiver of immunity (if at all) *only in the courts of the [waiving] sovereign*." *Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 86-87 (CA2 2001) (emphasis in original) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985)).

OIN's "waiver" does not meet the "formidable" requirements for mooting this long-standing sovereign immunity dispute. To begin, the waiver extends only to foreclosures for nonpayment of "real property taxation." But the Counties' foreclosure actions arise out of OIN's nonpayment of other types of charges as well. New York law subjects the disputed lands "to real property taxation, *special ad valorem levies, and special assessments*," and the lands are subject to tax liens and foreclosures for the nonpayment of *any* of these types of charges. N.Y. Real Property Tax Law § 300; *see also id.* §§ 102(21), 1102(1)-(2). Each of these charges is a defined statutory term of art, and the terms "tax" and "taxation" generally "do[] not include a special ad valorem levy or a special assessment." *Id.* § 102(20); *see also id.* §§ 102(15)-(16). OIN has refused to pay many of these types of charges (*e.g.*, for fire, sewer, improvements, etc.), which are at issue in the foreclosure

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scope of the purported waiver) (collecting authorities); *see also Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921-22 (CA6 2009) (invalidating waiver as unauthorized under governing tribal laws) (collecting authorities); *Winnebago Tribe of Neb. v. Kline*, 297 F. Supp. 2d 1291, 1303 (D. Kan. 2004) ("for a waiver of sovereign immunity to be effective, the waiver must be in compliance with the tribal law"); *World Touch Gaming, Inc. v. Massena Mgmt., LLC*, 117 F. Supp. 2d 271, 274-76 (N.D.N.Y. 2000) (invalidating waiver as unauthorized under tribal constitution and Civil Judicial Code).

proceedings but not addressed by the "waiver."[15] Nor does the "waiver" address the Counties' right to foreclose for nonpayment of the interest and penalties that have piled up over the past decade.[16]

The "waiver" falls short of mooting this case in many other respects. Beyond the statement in a letter to the Clerk that the "waiver" was "duly enacted" by the Tribal Council on November 29, 2010, OIN has not submitted the relevant tribal constitutional provisions, tribal codes, legal opinions, and other materials that courts typically scrutinize in determining whether a tendered "waiver" is valid. *See supra* n.14. Nor is there any mention of *where* and in *which courts* the waiver may be enforced. Thus it remains unknown whether the waiver extends to all courts, only to OIN's tribal courts, or to some other subset of courts. If the waiver only extends to the courts of the "state, county and local governments" referred to in the "declaration and ordinance," such a waiver would not encompass actions in *federal* court. *See Garcia*, 268 F.3d at 87 (general tribal waiver did not waive "immunity to suit in federal court" absent express mention of federal court proceedings). This hardly is sufficient protection for the Counties. Nor does the "waiver" specify which sovereign's laws will govern disputes,

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[15] *See, e.g.*, JA 285a-286a, 288a (referring to charges by "special assessment districts"); CA App. A-61, A-478 (sample foreclosure pleadings referring to "unpaid taxes and other legal charges").

[16] OIN claims in its December 2 letter to the Clerk that interest and penalties "are fairly encompassed by the ordinance," and "represents" that it "will not raise its sovereign immunity" as to these charges. We do not question the good faith of counsel's representation, but this hardly substitutes for a properly drafted and adopted tribal waiver that clarifies these and the many other issues discussed above, especially since any ambiguities will be construed *against* waiver.

disclaim tribal court jurisdiction, or waive any tribal exhaustion requirements that might apply. These elementary drafting issues are routinely addressed in tribal immunity waivers,[17] but not in OIN's "declaration and ordinance" or its counsel's correspondence to the Clerk.

Even putting all these concerns to one side, there is another fundamental reason why the "declaration and ordinance" do not moot the tribal sovereign immunity issue. OIN continues to insist that it *does* enjoy immunity from state and local *in rem* enforcement actions against the non-trust lands it has purchased on the open market. It has simply purported to "waive" that immunity in this one context—"enforcement of real property taxation through foreclosure by state, county and local governments." OIN has not changed its position on the underlying merits of its immunity claim in the least. To the contrary, it insists it is correct.[18] There is every reason to believe it will continue to invoke its supposed immunity in other *in rem* enforcement contexts, including with respect to zoning, land-use, health and safety, and other "local regulatory controls." *Sherrill*, 544 U.S. at 220 n.13; *see supra* pp.1-2. OIN has not renounced its claims to sovereign immunity with respect to these lands, nor offered to dismiss those claims *with*

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[17] *See, e.g.*, *World Touch Gaming*, 117 F. Supp. 2d at 275 n.3 (pointing to "[a] perfect example of an express waiver of sovereign immunity," which addressed choice of forum, tribal jurisdiction, tribal exhaustion, and other issues); *Deskbook*, *supra*, at 302-06, 624-25, 640-43.

[18] *See, e.g.*, *Honig*, 484 U.S. at 319 (case not mooted through unilateral action given party's "insistence" that it has the authority it claims); *United States v. Gov't of V.I.*, 363 F.3d 276, 286 (C.A.3 2004) (case not mooted through unilateral action "when a party does not change its 'substantive stance' as to the validity" of its position, but simply acts for "purely practical reasons (such as avoiding litigation)") (citation omitted).

prejudice." *Cf. Deakins v. Monaghan*, 484 U.S. 193, 200 (1988) (insufficient to vacate decisions below, relevant portions of the mooting party's underlying pleadings must be dismissed "with prejudice"). Even assuming that OIN has truly and "irrevocabl[y]" waived its claimed immunity from *in rem* enforcement action in the specific context of "real property taxation through foreclosure," OIN remains free to continue to invoke that claimed immunity in all other *in rem* enforcement situations.

Claims of tribal immunity from *in rem* proceedings are made in a variety of contexts, not only by OIN within the original boundaries of the ancient Oneida reservation, but by other tribes throughout the country. *See, e.g., Oneida Tribe of Indians of Wis. v. Vill. of Hobart*, 542 F. Supp. 2d 908, 921 (E.D. Wis. 2008) (rejecting Wisconsin tribe's immunity claim in the context of condemnation of non-trust lands and "assess[ment of] such property for the cost of improvements that specially benefit the property"); *New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 298 (E.D.N.Y. 2007) (rejecting New York tribe's immunity claim in suit to enjoin violations of state and local zoning, environmental, and anti-gaming laws on non-trust lands; "*Sherrill* allows a tribe to be sued by a state or town . . . to enforce its laws with respect to a parcel of [non-trust] land"); *Cass Cnty. Joint Water Res. Dist.*, 2002 ND 83, ¶¶ 8-25, 643 N.W.2d at 688-95 (rejecting North Dakota tribe's immunity claim in condemnation action against non-trust land); *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash. 2d 862, 873, 929 P.2d 379, 385 (1996) (rejecting Washington tribe's immunity claim in quiet title and partition action involving non-trust land "because the trial court's assertion of jurisdiction is not over the entity *in personam*, but over the property or the 'res' *in rem*").

As these decisions demonstrate, the underlying tribal sovereign immunity issue is identical in all material respects whether a particular *in rem* proceeding involves foreclosure,

condemnation or other enforcement action. *See Hobart*, 542 F. Supp. 2d at 921. Indeed, this Court in *Sherrill* emphasized the linkage between taxation and zoning, land-use, and other local "regulatory controls that protect all landowners in the area," and cautioned that immunity in the tax context would spark "a new generation of litigation" in these other *in rem* enforcement contexts. 544 U.S. at 219-20; *see also id.* at 202-03, 213-14.

Thus, even assuming *arguendo* that OIN's "waiver" mooted the immunity issue in the specific context of "enforcement of real property taxation through foreclosure," that leaves the immunity issue in other *in rem* contexts wholly unresolved. A dismissal now would only further exacerbate the "disruptive practical consequences" this Court sought to prevent in *Sherrill* and invite yet another "new generation of litigation." *Id.* at 220 n.13. At the very least, it is far from "absolutely clear" that OIN will not claim immunity from future *in rem* enforcement actions. *Laidlaw*, 528 U.S. at 190. Nor is it "absolutely clear" that the Counties and other local governments "no longer ha[ve] any need" for a judgment holding that tribal sovereign immunity does not extend to *in rem* enforcement actions against non-trust lands. *Adarand*, 518 U.S. at 223-24 ("it is far from clear that these possibilities will not become reality"). OIN has not succeeded in its eleventh-hour attempt to moot the immunity issue.

III. THE ORIGINAL ONEIDA RESERVATION WAS DISESTABLISHED OR DIMINISHED.

As in *Sherrill*, OIN's sovereign immunity claim must be rejected whether or not the boundaries of the original 1788 state reservation "acknowledge[d]" by the United States in the Treaty of Canandaigua of November 11, 1794, 7 Stat. 44, remain in force today or instead were "disestablished" or "diminished" at some point over the past two centuries. *See* 544 U.S. at 215 n.9. However many of

OIN's immunity claims turn in part on the argument that those ancient reservation boundaries remain undiminished in any way today. *See* Opp. at 19 (it is "particularly important" that the disputed lands are within OIN's "treaty reservation"); *see also id.* at 3, 7, 9-10.

Moreover, the diminishment issue inevitably will arise once again on remand unless this Court resolves it now. The District Court below held in the alternative that the disputed lands are immune from taxation under *state* statutes conferring immunity on any tribally owned real property "in [an] Indian reservation," and that the original reservation boundaries had never been disestablished or diminished to the slightest extent. *See Oneida Indian Nation of N.Y. v. Madison Cty.*, 401 F. Supp. 2d 219, 231 (N.D.N.Y. 2005) (applying N.Y. Real Prop. Tax Law § 454 and N.Y. Indian Law § 6). Thus, even if this Court denies tribal sovereign immunity, reverses the judgment below, and remands for further proceedings, the diminishment issue must be resolved.

There is every reason to resolve it now. The issue has now twice been fully briefed to this Court. The Second Circuit decided the issue in *Sherrill* and reaffirmed its decision in this case. *See Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 159-65 (CA2 2003), *rev'd on other grounds*, 544 U.S. 197 (2005); *Oneida Indian Nation of N.Y. v. Madison Cty.*, 605 F.3d 149, 157 n.6 (CA2 2010) (continuing recognition of 1794 reservation boundaries "remains the controlling law of this circuit"). Because the application of so many federal and state laws turns on the existence and location of reservation boundaries—including the definition of "Indian country" itself[19]—the issue should

[19] 18 U.S.C. § 1151(a) ("Indian country" includes "all land within the limits of any Indian reservation" under federal jurisdiction); *see also Cayuga Indian Nation of N.Y. v. Gould*, 14 N.Y.3d 614, 638-43, 930 N.E.2d 233, 246-50 (holding that 18th-

be decided once and for all to put an end to continuing jurisdictional chaos and conflict. *See, e.g., Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277, 2286 (2009) (reaching issue because "deciding the matter now will reduce the likelihood of further litigation"); *Quinn v. Millsap*, 491 U.S. 95, 106 (1989) (deciding rather than remanding issue because "there is no good reason to delay the resolution of this issue any further").

There is a "glaring inconsistency," *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 346 (1998), between the 1794 treaty, which "acknowledge[d]" the boundaries of the Oneidas' 1788 state reservation, and the Treaty of Buffalo Creek of January 15, 1838, in which the Oneidas agreed to "remove" to the western "Indian Territory" and to establish their new "home," "government," and "laws" out there. Arts. 2, 4-5, & 13, 7 Stat. 550, 551-52, 554. If the dry real estate language contained in various allotment-era statutes was "precisely suited" to terminating old reservation boundaries, *see DeCoteau v. Dist. Cty. Ct. for the Tenth Jud. Dist.*, 420 U.S. 425, 445 (1975), so much more the case for treaty language in which the United States and the Oneidas "agreed," "intended," and "understood" that the tribe would "remove" to a new "home" far away, and would practice its "government" and "laws" there, in the western "Indian Territory" rather than in Central New York. Arts. 2, 4-5, & 13, 7 Stat. 550, 551-52, 554. The Oneidas could not reasonably have expected to continue to exercise sovereignty, jurisdiction, and regulatory authority over lands they already had left and were now leaving. *See Menominee Indian Tribe of Wis. v. Thompson*, 161 F.3d 449, 458 (CA7 1998) (tribe "could not reasonably have expected to

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century Cayuga Reservation's boundaries remain intact even though the tribe has held *no* trust lands within that area since the Jefferson Administration (1807)), *cert. denied*, 131 S. Ct. 353 (2010).

continue" exercising previously reserved hunting and fishing rights following its agreement in a new treaty to remove to a new reservation 300 miles away).

The 1838 treaty accelerated a federally promoted removal process that had already been underway for a generation, pursuant to which 95% of the Oneidas now live outside of New York and the tribe's original reservation of 300,000 acres has dwindled down to a mere 32—a loss of all but one ten-thousandths (0.0001%) of the original reservation land base. *See generally Sherrill*, 544 U.S. at 205-07. To indulge in the fiction that the original reservation boundaries somehow survived intact is to ignore the 1838 treaty's plain language, purpose, context, and implementation, as well as the subsequent treatment of the area over the past 172 years by all affected governments (federal, state, local, and tribal), the dramatic demographic changes, and the numerous other factors discussed in the Counties' opening brief. *See* Brief for Petitioners at 41-56.

OIN places great reliance on the August 9, 1838 statement by Agent Ransom H. Gillet assuring the Oneidas that they would not be removed against their will and could remain on "their lands *where they reside*" and "*where they are* forever." JA 196a (emphasis added). Even giving the most generous construction to this statement, the Oneidas who still remained in New York in 1838 clearly agreed that they *either* had to leave the eastern United States or remain "*where they reside*" and "*where they are*." At the time of this agreement, the remaining Oneidas still possessed and "reside[d]" on only 5,000 acres of their original reservation—less than 2% of the lands encompassed by the original reservation boundaries. *See Sherrill*, 544 U.S. at 206. It is legally and historically spurious to construe Agent Gillet's words as extending not only to the lands where the Oneida actually resided in 1838, but to the entire area that had been included in the original reservation a half century earlier.

OIN argues that the 1838 treaty did not specifically address the lands that *previously* had been conveyed to New York, so that most of the original reservation remained entirely unaffected by this pivotal treaty in the history of U.S.-Iroquois relations. Opp. at 34. This Court specifically has held, however, that federal law can operate to extinguish reservation boundaries not only over lands conveyed pursuant to that law, but over lands *previously* disposed of as well. *See, e.g., DeCoteau*, 420 U.S. at 446-47 (1891 cession act terminated reservation status, including with respect to previously allotted lands); *see also Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1420-21 (CA10 1990) (federal law "cancelled reservation boundaries" over previously allotted lands); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1028 (CA8 1999) (same).

That is precisely what happened here. The express purpose of the federal law in issue—the 1838 treaty—was to relocate the Oneidas' "permanent home," "government," and "laws" outside of New York, with the possible exception of those individual tribal members who chose to remain "where they reside" and "are." This purpose is at irreconcilable odds with a claim to *expanded* territorial sovereignty in New York and a *restoration* of tribal jurisdiction over lands that had been conveyed (legally or not) by prior generations. The subsequent "jurisdictional history," *Hagen v. Utah*, 510 U.S. 399, 421 (1994), reconfirms the disestablishment or diminishment of the original reservation boundaries. Since the 1838 treaty, state and local governments have exercised unquestioned sovereignty, jurisdiction, and regulatory authority over the lands OIN now claims to have been "Indian country" for all these generations. *See Sherrill*, 544 U.S. at 211, 215-17, 219-20. The same "justifiable

expectations," *id.* at 215, that drove the result in *Sherrill* compel a finding of disestablishment or diminishment here.[20]

CONCLUSION

OIN's sovereign immunity defense is defined by, and subject to, "standards of federal Indian law and federal equity practice." *Sherrill*, 544 U.S. at 214. There is nothing in those standards that supports OIN's studied refusal to obey this Court's judgment in *Sherrill*, or its claim of a tribal "supersovereign" immunity exceeding that of any foreign or state sovereign. It is time for OIN to "lay[] down the prince." *Schooner Exch.*, 11 U.S. (7 Cranch) at 145. This Court should reverse the judgment below and hold that tribal sovereign immunity does not extend to *in rem* actions against tribally purchased immovable property that is not held in federal trust or otherwise under federal superintendence.

Respectfully submitted.

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[20] Lenox briefed the disestablishment and diminishment issues at much greater length on pp. 13-30 of its *amicus* brief in *Sherrill*, cited *supra* n.3 (drawing further on the federal Indian law doctrines of acquiescence, abandonment, extinguishment, release, and relinquishment in arguing that OIN's reservation boundaries have been disestablished or diminished).